Department of Justice

FOR IMMEDIATE RELEASE
TUESDAY, FEBRUARY 25, 1997

BJS
202/633-3047

ABOUT 6,600 ATTEMPTS TO BUY GUNS THWARTED BY BACKGROUND CHECKS EACH MONTH SINCE BRADY LAW ENACTED

186,000 Blocked from March 1994 through June 1996

WASHINGTON, D.C. -- During the first 28 months of the Brady Act's effectiveness (March 1994 through last June) more than 186,000 illegal over-the-counter gun sales were blocked by background checks, the Justice Department's Bureau of Justice Statistics (BJS) announced today. Of the average 6,600 attempts stopped each month, more than 70 percent were rejected because they were indicted or convicted as felons. The data refer only to attempted purchases from licensed firearms dealers and do not indicate whether rejected purchasers later obtained a gun.

Based on BJS statistics covering specifically January 1996 through June 1996, gun dealers made more than 1.3 million inquiries about the potential eligibility of potential handgun buyers. The data contained specific reasons for rejections. Approximately 34,000, or 2.6 percent, were rejected for the following reasons in percentages:

(MORE)

Convicted or indicted felon	72%
Fugitive	6
State law prohibition	4
Restraining order	2
Mental illness or disability . . .	1
Other*	15

*Includes people addicted to illegal drugs, juveniles, aliens, violators of local ordinances, etc.

As of mid-year 1996, 14 states reported that their presale investigations included checking for outstanding restraining orders, and 11 states looked into mental heath records. The report noted that not all states check the categories of mental disability, restraining orders or drug abuse. In states that do check for these conditions, rejection rates are higher for these circumstances.

The surveys were of 600 law enforcement agencies, of which 176 from 44 states responded. Using standard statistical techniques, the totals were adjusted to account for the non-responding states. BJS is continuing its efforts to obtain a more complete response rate.

The Brady Handgun Violence Prevention Act (the Brady Act) provides that presale inquiries will be made permanent through

(MORE)

the National Instant Criminal Background Check System (NICS), which will be administered by the Federal Bureau of Investigation. It is to be established by November 1998, when the waiting period of the current system will be eliminated.

When the Brady Act took effect in February 1994, there were an average 3,100 monthly gun application rejections in the 32 states that the act required to follow its presale review procedures. From March 1994 through last June 30 there were 86,000 rejections of about 4.2 million applications or inquiries.

Federal law prohibits firearm sales to a person who--

- is under indictment for a crime punishable by imprisonment for more than one year or has been convicted of such a crime,
- is a fugitive from justice,
- is an unlawful user of a controlled substance,
- has been adjudicated as mentally defective or has been committed to a mental institution,
- was dishonorably discharged from the armed forces,
- has renounced United States citizenship,
- is subject to a court order restraining him or her from harassing, stalking or threatening an intimate partner or a child, or
- is a person who has been convicted of domestic violence.

The bulletin, "Presale Firearm Checks" (NCJ-162787), was

Written by Don Manson, of BJS, and Gene Lauver, of the Regional Justice Information Service. The statistics were obtained from the Treasury Department's Bureau of Alcohol, Tobacco and Firearms (March 1, 1994 through December 31, 1995) and from a BJS survey (January 1, 1996 through June 30, 1996).

The report is available on the Internet on BJS's Internet home page by clicking on "What's new at BJS." The BJS webpage address is:

http://www.ojp.usdoj.gov/bjs/

# # #

BJS97004
After hours contact: Stu Smith at 301/983-9354

DRAFT

The Honorable Robert Dole
810 First Street, N.E.
Suite 300
Washington, D.C. 20002

Dear Senator Dole:

Thank you for your letter, also signed by Speaker Gingrich, regarding the implementation of the Brady Law. I believe it is important to address several of the matters raised in your letter.

First, as a result of the Brady Law, prohibited persons have found obtaining firearms from federally licensed dealers much more difficult, and many of them are being deterred from attempting to do so. According to figures compiled by the Department of Treasury, since being enacted in December of 1993 the Brady Law has functioned as intended and anticipated by preventing approximately 60,000 prohibited persons -- including convicted felons, fugitives from justice, and persons subject to certain domestic violence restraining orders -- from purchasing handguns. The fact that this number of prohibited persons were thwarted in their atempts to purchase handguns from federally licensed firearms dealers demonstrates the vital need for Brady background checks.

In addition, this Administration has aggressively pursued gun traffickers and others who commit armed and violent crimes. The Bureau of Alcohol, Tobacco, and Firearms has expanded the number of investigations aimed at illegal gun traffickers -- including dealers, gun runners, and straw purchasers -- who supply violent criminals and juveniles. Since I have been Attorney General there has been no higher priority of the Department of Justice than the prosecution of violent crimes committed with firearms. The Department of Justice, through the Anti-Violent Crime Initiative, is working with BATF and state and local law enforcement to aggressively prosecute these cases.

Second, your claim that the Administration has been inadequate in its Brady prosecutions is unfounded. As you know, the Brady Law did not create any new substantive federal criminal offenses for purchasers. The primary function of the Brady Law was not to create new prosecutive mechanisms, but rather to prevent prohibited persons from obtaining handguns from federally licensed firearms dealers. Because the Department of Justice compiles statistics for statutory offenses, such as making false statements, figures on the breakdown of prosecutions for false statements on Brady check forms, as distinct from other firearms forms, are not available. Nonetheless, there has been no reluctance on the part of the U.S. Attorneys to prosecute defendants who have made false statements on firearm purchase forms, including Brady check forms, where appropriate. Moreover, there have been many cases where fugitives attempting to purchase firearms have been identified and apprehended as a result of the check required under the Brady Law. Because these cases generally are prosecuted at the state and local level, no national statistics are available.

Finally, the Administration, along with our law enforcement partners at the state and local level, has been working diligently to create the National Instant Criminal Background Check System (NICS). Contrary to the assertion in your letter we have met or exceeded all relevant implementation deadlines for tasks set forth in the statute.

For example, within the first six months after enactment we completed the statutorily required survey of criminal history records systems in every state, and developed timelines agreed upon by each state for provision of complete and accurate information to the NICS. In addition, the Federal Bureau of Investigation convened its Brady Act Task Force in April 1994 to help design the NICS infrastructure. In March, the FBI completed a draft Concept of Operations which their computer engineers are using to begin constructing the system. Having been approved by the FBI's Advisory Policy Board on June 12, the Concept of Operations now awaits final approval by Department of Justice. These efforts establishing the framework for the operation of the NICS are well underway.

The FBI also is collecting the necessary information for the NICS data files (e.g. federal and state criminal history records, citizenship renunciations, illegal aliens, etc). The vast majority of the information relating to the prohibiting categories originates not at the federal level but at the state and local levels. Although the Brady Act did not require states to provide such information to the NICS, most states will participate voluntarily. The FBI will have completed the NICS infrastructure before all the states are able to provide complete and accurate information to the NICS, as indicated by the published timelines for state participation.

In anticipation of these problems at the state level, the Brady Act authorized $200 million for National Criminal History Improvement Program (NCHIP) grants to help states upgrade their records systems. Every state already has received an NCHIP award on an expedited basis and technical assistance is being provided to states at no cost to them. Although the failure to pass a permanent FY 1996 appropriation for the Department delayed the next round of NCHIP grants, since that impasse was resolved, the Department's program announcement allowing the states to obtain their second round of $25 million in NCHIP grants was published last month. States will need more of the funding authorized by the Brady Law to help upgrade their records systems. Accordingly, the Administration has requested an additional $50 million in its FY 1997 budget to help meet this need.

I hope you find this responsive to the issues raised in your letter. If I may be of further assistance on this or any other matter concerning the Department of Justice, please do not hesitate to contact me.

Sincerely,

Janet Reno

The Importance of the Brady Bill

February 1997 marked the third anniversary of the enactment of the Brady Law, which mandates a five-business-day waiting period for handgun purchases. When President Clinton signed the Brady Handgun Violence Prevention Act into law, it represented the successful culmination of a history of gun-related positions and activities undertaken by the IACP since the 1920s.

Early resolutions focused on establishing uniform laws concerning the sale, carrying and use of revolvers, pistols, etc. A 1922 resolution stated, "We feel that the great number of shocking crimes, which are of almost daily occurrence, has increased to such an alarming extent as to point to us clearly our duty to ask for the enactment of laws in our states which will regulate the carrying of weapons which make such crimes possible."

More recent resolutions called for mandatory sentencing of persons convicted of crimes involving handguns; mandatory training and demonstration of proficiency in the lawful use and security of firearms by the permit holder; a mandatory waiting period; a mandatory check by local police agencies of all applicants' state and federal fingerprint and criminal records; and a national system to allow us to accurately and speedily identify felons who attempt to purchase handguns. With these positions on record, the IACP embraced the provisions of the Brady Bill.

After nearly seven years of heated debate with representatives of the gun lobby, we—along with other law enforcement groups and concerned citizens—celebrated our victory with Sarah and Jim Brady when the Brady Bill became law during the latter part of 1993. Now, three years after its implementation, we are pleased to report that it already has a successful track record of keeping guns out of the hands of potential purchasers with criminal records, a history of mental illness or other disqualifying records.

The DOJ's Bureau of Justice Statistics published the first statistics assessing the impact of background checks on preventing sales of handguns to prohibited persons last month, and the results are impressive. Between March 1994 and June 1996, for all states combined, there were almost nine million applications to purchase firearms and an estimated 186,000 rejections. Over 70 percent of the rejected purchasers—130,200 people—were convicted or indicted felons. On the average, an estimated 6,600 firearm purchases were prevented each month by background checks.

From my perspective, it also appears that the Brady Law is making America safer from violent crime. Statistics in the FBI's Uniform Crime Report covering changes from 1994 to 1995 demonstrate this as fact:

- Murders with firearms decreased 11.6 percent.
- Aggravated assaults with firearms fell 5.8 percent.
- Armed robberies fell 7.6 percent.

The FBI's report states that the decrease in the use of firearms during robberies and aggravated assaults may help explain the overall decline in the murder rate, because injuries from firearms are more often lethal than injuries from other weapons.

Unfortunately, the background checks required by the Brady Law have become a contentious issue for some. In November 1996, the Supreme Court heard arguments by two sheriffs who challenged the constitutional validity of the requirement to conduct background checks. Their written filings claim that Congress has no power to force them to be part of the gun control policy, and refer to a 1992 ruling based upon the 10th Amendment that prevents the federal government from requiring states to enact laws and regulations to further federal programs. The sheriffs also stated that the time consumed by background checks means less time for deputies' investigative duties. They have the backing of the National Rifle Association and other gun owners' groups.

Chief Darrell L. Sanders
Frankfort, Illinois

The reality, however, is that the background checks are only a temporary inconvenience. After November 1998, instant background checks will be required for purchases of all firearms through a computer system developed and implemented by the federal government. At present, law enforcement is required only to check the records that are "available" to them. Their efforts need only be reasonable in light of the availability of resources, access to records and law enforcement priorities in their jurisdiction. Further, the Bureau of Alcohol, Tobacco and Firearms—the agency responsible for enforcing the Brady Law—has informed local governments that they may impose a charge on the buyer to cover the costs of the background check. This means that the agency is relieved of the financial burden.

It appears that the challenge to the background check requirement may be motivated more by opposition to gun control than concern for states' rights. If their efforts to defeat the requirement are successful, we must be prepared to quickly develop a legislative remedy that will overcome any potential constitutional question.

Throughout its history, IACP has supported measures to keep handguns out of the wrong hands, and we must continue to take all steps necessary to keep a law like Brady on the books. As we await the ruling from the Supreme Court, we trust that the wisdom of the nine judges will prevail, and the requirement for background checks will remain. If the ruling is negative, it will be imperative for us to pull out all the stops and do everything we can to save this effective crime-fighting tool. ❖

In last month's "President's Message," I incorrectly identified Alice Stebbins Wells as the first woman to have both arrest powers and the title of police officer when, in fact, the first woman to have this distinction was Mary Owens. I want to thank Dr. Dorothy M. Schulz, associate professor at the John Jay College of Criminal Justice, for bringing this to my attention, and for setting the record straight.

HANDGUN CONTROL

ONE MILLION STRONG . . . working to keep handguns out of the wrong hands.

FOR IMMEDIATE RELEASE: February 28, 1997

CONTACT: HOLLY RICHARDSON
202-898-0792

newsrelease **newsrelease**

SARAH and JIM BRADY JOIN LAW ENFORCEMENT TO COMMEMORATE THIRD ANNIVERSARY OF BRADY LAW

(Washington, DC) "Today is a very special day for Jim and me as we commemorate the third anniversary of when the Brady Law went into effect," said Sarah Brady, Chair of Handgun Control, Inc. "We are proud to stand with our friends in law enforcement who worked so hard to get this law passed. Law enforcement fought for the opportunity to do the background checks mandated in the law because they knew how important it was to keep handguns out of the hands of criminals."

Marking the third anniversary of the Brady Law, Mr. and Mrs. Brady noted that the Brady Law is working the way it was intended to work-- keeping handguns out of the hands of felons and other prohibited purchasers. This week, the Department of Justice released a study showing that, since the Brady Law went into effect, background checks nationwide have kept 186,000 criminals and other prohibited purchasers -- including 157 felons every day -- from buying handguns.

"We don't know how many lives have been saved or how many crimes were prevented because these felons couldn't get a handgun," said Mrs. Brady. A recent analysis of FBI Crime Reports, however, indicates that gun crimes have fallen more than violent crime overall since the Brady Law went into effect. The number of Federal Firearms Licensees has also dropped by more than half since 1993.

"Earlier this week, we saw what a gun in the wrong hands can do when a gunman opened fire on the observation deck of the Empire State Building. The gunman in that shooting had no prior criminal record, but everyday criminals do attempt to buy guns and it's the Brady Law that stops them," noted Mrs. Brady.

In front of the U.S. Supreme Court, Jim Brady, board member of CPHV, noted that the justices have yet to issue a ruling on the constitutionality of the background checks.

"Let me say this -- the Brady Law background checks are working," said Mr. Brady. "Law enforcement fought to be able to do them, they will continue to do them. We must make sure that we don't go back to the days of "lie and buy" when a criminal could walk into a gun store, lie on the form, and walk out with a handgun.

"Here's a big thumbs-up to the Brady Law -- and our friends in law enforcement who helped pass it," said Mr. Brady.

Joining Mr. and Mrs. Brady at the

ROUTING AND TRANSMITTAL SLIP

Date 4/2/97

	Initials	Date
TO: **Kent Markus, Andy Fois, Bert Brandenburg, Jonathan Schwartz, Dennis Burke**		
COPY: Eldie Acheson		

REMARKS: Received the attached suggested edits from Eldie to the "Brady Reversal" letter. Her edits are the handwritten text. I would like to make these edits, but because you all signed off on the printed version, I would appreciate it if you would take a quick glance at the attached. If these suggested edits are acceptable to you, please simply initial below and fax back to me on 4-2504. If you have any concerns about these please note them and fax back. One way or the other, would you please send a response by **close of business on Thursday, April 3, 1997**.

____ **OK to make suggested edits**

____ **Not OK to make suggested edits (see attached)**

Nicholas M. Gess, Director
Office of Intergovernmental Affair
Room 1340, Main Justice Building

202-514-3465

4/2/97 - 11:00

Office of the Attorney General
Washington, D.C. 20530

-ital.
-- the requirement that state, ~~to~~ county or local officials conduct background checks --

one element

Dear Law Enforcement Colleague:

As you are no doubt aware, earlier today, the Supreme Court ruled that ~~part~~ of the Brady Handgun Control Act is unconstitutional. Although we are disappointed in the Court's decision, we ~~must all~~ shall, of course, ~~abide by~~ it. proceed in accordance with

We want~~ed~~ to make certain that ~~all of~~ you understand that the Supreme Court decision did not "strike down the Brady Act," "declare it unconstitutional" or any one of a number of broad-based and inaccurate statements which you may hear. Rather, all the Court did is state that the Federal government cannot require that state, county and local officials conduct the checks provided for under the law until November 1998, at which time the permanent Brady check system maintained by the Federal government (Instacheck) will become effective.

We know that the vast majority of concerned and effective law enforcement officers in this country support and conduct background checks under the Brady Act, not because they are required but because -- plain and simple -- it is good law enforcement. Therefore, this decision ought to have little impact on law enforcement. Even with the ruling, as you know, Those who wish to purchase a handgun from a licensed firearms dealer (FFL) must still complete a form under the Brady Act and the FFL must still forward that form to the chief law enforcement officer (CLEO). As before, if, after five days, the CLEO has not advised the FFL that the FFL may not transfer the handgun, the FFL may transfer the handgun to the purchaser.

Although the Court has ruled that the Federal government may ~~The sole change occasioned by the Supreme Court decision is that the CLEO is~~ not require~~d~~ a CLEO to run the Brady check, We ~~know~~ are confident that virtually every law enforcement agency in America will continue to run these checks voluntarily. There is no law which requires a homicide investigator to take photographs of a homicide crime scene or a narcotics investigator to have suspected drugs tested by a laboratory, but virtually all investigators do these things because they are good law enforcement. As your colleagues, ~~we~~ I urge you to continue assuring that the background checks called for by the Brady Act are done policy and practice.

mentally unstable persons

Since the Brady Act came into effect, over 186,000 felons, fugitives, ~~wife beaters~~, military deserters, drug addicts, and other prohibited handgun purchasers have been denied handguns. It would be nothing short of a national tragedy if, that same number of prohibited individuals were able to purchase handguns because law enforcement officers stopped doing Brady background checks.

those convicted of domestic violence crimes

We recognize that there may be a very few places in this country where the CLEO makes the irresponsible decision not to run Brady checks. It's just common sense that we all keep doing whatever we can to keep ~~murderers, rapists and mentally unstable persons from obtaining handguns~~. The safety of all of us is better assured when Brady background checks are conducted.

who, since 1968, ~~we've~~ Congress has said should not have firearms from obtaining handguns.

Our request is simple: please join us in continuing to enforce the Brady Act.

Sincerely,

Janet Reno

GESSNICK\BRADY.509
033197-1405

Dennis K. Burke 03/17/97 11:02:31 AM

Record Type: Record

To: Michelle Crisci/WHO/EOP, Bruce N. Reed/OPD/EOP

cc: Elena Kagan/OPD/EOP, Leanne A. Shimabukuro/OPD/EOP
Subject: Brady Case

Here is where we are on Brady:

If the Supreme Court finds Brady unconstitutional, it would be because of one element of the law: The Brady law "requires" a state or local law enforcement official to conduct a reasonable background on a potential handgun purchaser. The Court would rule that the Federal Government can not "require" a state or local official to enforce a Federal law because it violates the 10th Amendment to the U.S. Constitution.

The rest of Brady would still be intact. Handgun purchasers would still be required to fill out a 4473 form (the form we just modified w/ our Empire State Bldg announcement) and the Federal Firearms License Dealer (FFL) must still forward that form to the chief law enforcement officer (CLEO) for the jurisdiction. If after five days, the CLEO has not advised the FFL that s/he may not transfer the handgun, the FFL may transfer the handgun to the purchaser. CLEOs could conduct background checks (and most will) but they will not be required to (also, Brady only applies in 22 states now -- the others are exempt because they have instant background checks, licensing requirements, etc.)

So our message could be that the majority of the Brady Law is still intact, but criminals should have no safe haven. This landmark public safety measure is too important to have judicially-created exceptions. The law should be clear -- no background check, no gun sale. We will be sending legislation to Congress this week to fix this Rehnquist Court decision and POTUS urges Congress to move on it quickly.

The 3 steps we are taking:

1) Sending legislation to the Hill that will respond to this Supreme Court decision:

2) Release a Pledge signed by Chiefs and Sheriffs throughout the nation that they will continue to enforce the Brady Law.

3) Release Letter from Reno and Rubin to every police chief and Sheriff in the country urging them to continue their public safety duty to conduct background checks on handgun purchasers.

Legislation:

We had been discussing the approach of conditioning law enforcement funding to states and localities on them passing legislation requiring background checks. The law enforcement groups were adamantly opposed to that approach. So now we are looking at how we can fix Brady by regulating FFLs. Here is the most current form of the idea:

For an FFL to be able to sell a handgun, s/he must now receive a certification from the CLEO that the CLEO will conduct a background check on prospective purchasers. Without this certification, the FFL would be prohibited from selling handguns -- at all.

At first blush, this appears rather heavy-handed but it does put the pressure on the CLEO and not the Federal government. Most CLEOs are going to conduct background checks, those who refuse will have to explain why they don't to their gun owners -- because there will be no handgun sales in their area. It sticks to a simple overall message -- no background check, no gun sale.

Obviously, this approach needs some additional thought but at least the idea of regulating FFLs and not conditioning funding appears to be the right avenue. Handgun Control likes this particular approach but I think they are also trying to think it through.

One of the questions we have to ask ourselves is whether this would ever pass, we come across looking heavy-handed with a DOA bill, and whether that, in itself, harms the Brady legacy?

Based on Elena's suggestion, I have also asked both Treasury and Justice to give us options on what POTUS could do by executive action -- for example, could he, by executive order, prohibit a FFL from selling a handgun w/o a CLEO certification? We will continue to pursue.

Dennis K. Burke 03/28/97 09:55:44 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Leanne A. Shimabukuro/OPD/EOP
Subject: Brady Law Memo

In Wednesday's crime meeting, Rahm said he wanted to send a memo to the President on Brady. I have attached a rough draft. Would you take a look at it, when and if you have a chance? I am giving Rahm a copy, now, because he wants to look at it over the weekend. I think he wants to submit it to the President on Monday. Some of this stuff was covered in Bruce's weekly already.

The SG's office were very strange to Kent about this whole issue, today. They had a meeting about legislative fixes today and Kent said that they were going off on tangents about whether we even want to send legislation to the Hill. They are worried that if this legislative fix ever passed -- which is a very high bar to meet --- it could cause us bigger problems because 10th amendment advocates would go forum shopping, have the fix overruled in an opinion that would even further restrict the federal government's authority (.... this is very nutty). They were also bringing up "equal footing" doctrine concerns (which is bunk) and are worried that this legislation would be an "in your face" to the Court that they would not favorably react to (so then what was the Lopez fix that Walter testified before Congress on?)

I told Kent that, first of all, the Justice Department Building has a serious asbestos problem on the east side of the fifth floor and they need to fix it because it is seriously affecting the minds of some folks in the SG's office.

The truth is Walter was out of town, today, and some of these folks should not be let out of their study w/o his supervision.

BRADYMEM.328

THE WHITE HOUSE

WASHINGTON

Dennis Burke
67431

ıarles F. C. Ruff
›unsel to the President

.ll Marshall
Associate Counsel to the President

Karen A. Popp
Associate Counsel to the President

DATE: April 4, 1997

REGARDING: Brady Bill Options

The following presents an overview of the various legislative options available to the Administration should the Supreme Court strike down the local law enforcement background check requirements of the Brady Law. As you will note, we have identified both the policy issues and the legal issues that are present in each alternative. The legal analysis can only be preliminary, however, because the constitutionality of any particular legislative proposal will depend on how the Supreme Court crafts its Brady Law decision. For this reason, the Justice Department has strenuously requested that the Administration not make any decision regarding possible legislative responses until there has been time to analyze the Supreme Court's decision.

I. OBJECTIVES

In assessing any possible response to an adverse judicial decision we should consider three separate, and potentially conflicting, objectives.

A. Policy -- advance the substantive policies of the Brady Bill of providing background checks for the purchasers of all handguns.

B. Political -- provide a clear answer to those claiming that the advancement of the policies advanced by the Brady Bill have been derailed.

C. Legal -- propose a legislative solution that is constitutionally sound and minimizes the opportunity for opponents to advance new and potentially damaging legal theories.

II. LEGISLATIVE OPTIONS

A. Quid Pro Quo Funding

This option would condition the receipt of federal monies for crime programs upon state and local communities agreeing to abide by the background check requirements.

1. Policy concerns. This option would provoke resistance in the law enforcement community. There are also some real world questions as to whether there are any programs to which compliance with the Brady Law could be realistically tied. Finally, there may also be a practical problem in that, for a variety of reasons including the normal timings of grant allocation, there may not be any grant monies to use as leverage for the relatively short period between the date of a Supreme Court opinion and late 1998 when the federal government will assume background check responsibilities.

2. Legal issues. Congress is generally free, under the Spending Clause, to use conditions on federal grants to states as a means of encouraging state action in the service of federally defined goals. Recent decisions, however, have identified two potential limitations on conditional spending power legislation. First, the purposes of the grant condition must be related to the purposes of the grant program. The more attenuated the connection between the purposes of Brady Law background checks and the conditional federal grants, the greater the risk of invalidation. Second, some judges have indicated a willingness to hold that legislation which withdraws funding, can under some circumstances, cross the line from encouragement to coercion and thereby violate constitutional principles of federalism. Although under current law a properly drafted spending program should survive constitutional scrutiny, such a law might also be used as a vehicle for opponents to test this 'coercion' principle.

B. Federal Preemptive Regulation in Noncomplying Jurisdictions

This option would impose on non-complying localities regulations which could work as alternatives to background checks in furthering Brady Law policies. Alternatively, imposition of these requirements might encourage non-complying localities to reconsider their options and voluntarily comply with the Brady Law itself.

Examples in this category include mandating a relatively long waiting period for gun purchasers which can only be shortened by completion of a background check. A second possibility is a requirement that guns may not be purchased at all in localities that do not voluntarily adopt background check requirements. A third option is to send all background checks for non-complying localities to federal agencies for whatever reasonable period it might take those federal agencies to complete those checks.

1. Policy concerns. The imposition of restrictions on the purchase of guns in non-complying communities could promote voluntary compliance with Brady; and if a locality

refused to comply, the new strictures could be an effective tool in checking the sale of handguns to persons with problematic backgrounds. On the other hand, the imposition of harsh strictures would impose penalties on those who would be otherwise eligible to purchase guns under Brady. In addition, providing disincentives for persons to buy guns in non-complying localities places the brunt of enforcement on arguably innocent third parties --gun dealers. Affecting third parties in this manner could provoke an unfavorable backlash.

2. Legal concerns. In areas where Congress has authority under the Commerce Clause to regulate private activity directly, it also has the authority to offer States a choice between regulating in conformity with federal standards or ceding the field to preemptive federal regulation. However, as with the spending power, noted above, the courts may rule that conditional Commerce Clause legislation might also be so coercive as to violate federalism concerns. Distinguishing permissible encouragement from unlawful coercion in this context is not clear. Although the federal government may impose genuine federal regulation in jurisdictions that fail to perform background checks, regulations designed to force States into assuming the responsibilities that Congress has assigned to them may be invalidated. Thus, mandating longer waiting periods in jurisdictions where local officers refuse to conduct background checks, would be suspectable to coercion claims if the delay were not justified.

C. Federal Operation of the System

This option would turn over the background check operation to the FBI or ATF immediately, or, if that is not feasible, would seek to move up the date that the FBI would assume operations.

1. Policy concerns. DOJ is unable to definitively determine when the FBI would be in a position to take over the background check operation. The time when such an appraisal can be made is also indeterminate. In addition, the cost of placing the responsibility for all background checks in the hands of the FBI at this time may be significant. DOJ is attempting to determine whether ATF may be currently in a position to assume the background check responsibilities.

2. Legal issues. This approach would rely on Congress' well established power to regulate gun sales in or affecting interstate commerce. It would not raise any significant constitutional issues.

D. Requiring Background Checks as a Precondition to Handgun Sales

This option would prohibit federally licensed firearms dealers from selling handguns unless the chief law enforcement official has certified that he/she will conduct a background check.

1. Policy concerns. This option places the brunt of enforcement on arguably innocent third parties -- gun dealers and persons otherwise eligible to purchase guns under Brady.

2. Legal issues. Congressional power to ban handgun sales altogether under the Commerce Clause presumptively includes the power to impose a ban selectively, where States and localities refrain from performing background checks. Absent coercion, as discussed above, a properly crafted provision should pass constitutional muster. In other words, as long as the federal controls are to ensure that prohibited persons are prevented from purchasing handguns, and not to coerce local authorities into conducting the background checks, the legislation would be constitutional.

E. No Legislative Response

1. Policy concerns. While there will undoubtedly be pressure to pursue a legislative response if there is an adverse Supreme Court decision, there are also policy reasons that militate against legislative action. These concerns deserve significant considerations.

a. First, an adverse decision raises essentially only timing concerns. The FBI is scheduled to take over the background check operation in late 1998.

b. Second, the Court's decision would apply only to 24 states (alternative systems that meet federal standards are already in place in the other jurisdictions) and even in those 24 states, many law enforcement officers have announced or are expected to announce that they will continue to voluntarily comply with Brady law requirements.

c. Third, a new legislative proposal is unlikely to pass.

d. Fourth, if a bill does pass it may play into the litigation strategy of the anti-gun control forces who would be free to pick and choose among federal court judges in an effort to obtain a favorable decision and a favorable precedent.

2. Legal issues. Not applicable.

III. TIMING OF A LEGISLATIVE RESPONSE

There has been some suggestion that the Administration propose a legislative response to an adverse Supreme Court decision on the day of that decision. As overriding concern, however, is that a cohesive and meaningful response must necessarily require serious study of the judicial opinion. Moreover, even if the response was well-thought out and adequately anticipated the Court's argument, an immediate cry for legislative intervention would likely be perceived as unduly reflexive and politically driven.

IV. ALTERNATIVES TO A LEGISLATIVE RESPONSE

In lieu of, or in addition to, the Administration could respond to an adverse Supreme Court decision by a communications event bringing together law enforcement officials who would agree to voluntarily enforce the Brady Law's provisions. The President could also issue a statement after the decision was rendered.

Treasury Memo on Brady 2/20/94

The Court could hold in Mack v. United States that Brady's provision for law enforcement officers to conduct background checks of prospective handgun purchasers violates the Tenth Amendment. If so, three elements of the law could still remain standing -- Brady's 5-day waiting period, the requirement that gun dealers obtain a statement from purchasers concerning the proposed handgun sale, and transfer by gun dealers of the statement to State or local law enforcement officers. In this situation,

- o Law enforcement officials would be able to continue to conduct criminal record checks of handgun purchasers on a voluntary basis.
- o The decision would apply only to the 24 Brady states, and not to the Brady alternative states (states where state legislatures have established an alternative system that meets federal standards). (List attached.)
- o ATF believes that the vast majority of local chief law enforcement officers would continue to perform background checks. After the Fifth Circuit reversed a portion of the Brady law, ATF believes, based on an informal, incomplete survey, that the vast majority of local chief law enforcement officers in Texas, Louisiana, and Mississippi continue to perform background checks. However, ATF indicates that no checks are being performed for purchases in Houston, Texas.

Options for responding:

1. A statement by the President exhorting law enforcement officials that the Brady law is workable and encouraging them to continue conducting record checks on a voluntary basis.*

2. A letter from Secretary Rubin and Attorney General Reno to law enforcement colleagues, urging continued enforcement of the Brady Act. (Draft attached.) The letter could be sent electronically by ATF to all state and local law enforcement organizations, and also sent to state attorneys general.

3. Telephone calls by the President and/or senior Administration officials including Under Secretary Kelly to the Governors of the 24 Brady states to urge that they support continued enforcement by local chief law enforcement officials.

4. In the event that some local chief law enforcement officers refuse to do background checks, ATF would attempt to identify state or local law enforcement officials who are willing to conduct background checks in those jurisdictions where the checks will not otherwise be performed.

5. ATF Director Magaw would send a notification to Federal Firearms Licensees explaining the decision and noting that their obligations remain unaffected.

*The President could make the following points in his statement:

a. While the Court's decision is disappointing, important elements of the Brady law were left intact -- dealer's obtaining background statements from purchasers; dealers' notification to law enforcement officials of the intended purchase of handguns; and the 5-day waiting period prior to delivery.

b. The Court did not "strike down the Brady Act", "declare it unconstitutional" or any one of a number of broad and inaccurate statements that may be heard. Rather, the Court held that State and local officials cannot be required to conduct the checks provided for in the law.

c. The decision need not disrupt the current process of conducting criminal background checks. Enactment of the Brady law was widely supported by the law enforcement community and it is anticipated that law enforcement officials will continue to make these checks. In those few areas where the courts have already held that law enforcement officials need not make Brady checks, the vast majority of those officials have continued to make the checks voluntarily.

d. Background checks on handgun buyers have proved their worth. Approximately [238,000] (BJS Bulletin, March 1997) felons and other categories of prohibited persons have been prevented from obtaining handguns from gun stores since the Brady law took effect.

e. The efforts of law enforcement officials in conducting these checks will not have to continue indefinitely because the national instant criminal background check system will replace the current system in November 1998.

f. Continued record checks under the Brady law are, plainly and simply, good law enforcement. We must not return to the old system under which many states made no effort to verify statements made by felons and other prohibited persons when they bought handguns from gun stores.

LIST OF STATES SUBJECT TO THE FEDERAL FIVE DAY WAITING PERIOD OR STATES HAVING ALTERNATIVE SYSTEMS AS DEFINED IN THE LAW

As of 03-05-97

STATES WHICH MUST COMPLY WITH THE FEDERAL 5-DAY WAITING PERIOD 24

Alabama	Mississippi **	Puerto Rico
Alaska **	Montana **	Rhode Island
Arizona **	Nevada	South Carolina
Arkansas	New Mexico	South Dakota **
Kansas	North Dakota **	Texas **
Kentucky	Ohio	Vermont
Louisiana **	Oklahoma **	West Virginia
Maine	Pennsylvania **	Wyoming

** In these States, the Federal 5-day waiting period does not apply to transfers of handguns to persons holding valid permits/licenses to carry handguns issued within 5 years of the proposed purchase.

STATES WHICH MEET ONE OF THE ALTERNATIVES TO THE FEDERAL 5-DAY WAITING PERIOD 20

California	--	Permit or other approval-type system
Connecticut	--	Permit or other approval-type system
Delaware	--	"Instant check"
Florida	--	"Instant check"
Guam	--	Permit or other approval-type system
Hawaii	--	Permit or other approval-type system
Illinois	--	Permit and "instant check"
Indiana	--	Permit or other approval-type system
Iowa	--	Permit or other approval-type system
Maryland	--	Permit or other approval-type system
Massachusetts	--	Permit or other approval-type system
Michigan	--	Permit or other approval-type system
Missouri	--	Permit or other approval-type system
Nebraska	--	Permit or other approval-type system
New Jersey	--	Permit or other approval-type system
New York	--	Permit or other approval-type system
Oregon	--	Permit/Instant Check
Virginia	--	"Instant check"
Virgin Islands	--	Permit or other approval-type system
Wisconsin	--	"Instant check"

STATES ORIGINALLY SUBJECT TO THE FEDERAL 5-DAY WAITING PERIOD THAT NOW HAVE SYSTEMS THAT MEET THE ALTERNATE REQUIREMENTS 9

Colorado	Beginning	03-01-94	--	"Instant check"
Georgia	Beginning	01-01-96	--	"Instant check"
Idaho	Beginning	06-27-94	--	"Instant check"/ permit (permit 5-15-95)
Minnesota	Beginning	08-01-94	--	Permit or other approval-type system
New Hampshire	Beginning	01-01-95	--	"Instant check"
North Carolina	Beginning	12-01-95	--	Permit or other approval-type system
Tennessee	Beginning	05-10-94	--	Permit or other approval-type system
Utah	Beginning	03-01-94	--	"Instant check"
Washington	Beginning	06-06-96	--	Permit or other approval-type system

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Note: Louisiana status was incorrect on previous list.

DRAFT

Dear Law Enforcement Colleague:

As you are no doubt aware, earlier today, the Supreme Court ruled that part of the Brady Handgun Control Act is unconstitutional. Although we are disappointed in the Court's decision, we must all, of course, abide by it.

We wanted to make certain that all of you understand that the Supreme Court decision did not "strike down the Brady Act," "declare it unconstitutional" or any one of a number of broad-based and inaccurate statements which you may hear. Rather, all the Court did is state that in those States where Brady's 5-day waiting period applies, the Federal government cannot require that state, county and local officials conduct the checks provided for under the law.

We know that the vast majority of concerned and effective law enforcement officers in this country support the conduct of background checks under the Brady Act, not because they are required but because -- plain and simple -- it is good law enforcement. Therefore, this decision ought to have little impact on law enforcement. Those who wish to purchase a handgun from a licensed firearms dealer (FFL) must still complete a form under the Brady Act and the FFL must still forward that form to the chief law enforcement officer (CLEO) ~~for the jurisdiction~~ where the purchaser resides. If, after five business days, the CLEO has not advised the FFL that the FFL may not transfer the handgun, and the FFL has no information that the purchaser is prohibited, the FFL may transfer the handgun to the purchaser ~~if the FFL has no information that the~~.

The sole change occasioned by the Supreme Court decision is that the CLEO is not required to run the Brady check. We know that virtually every law enforcement agency in America will continue to run these checks voluntarily. There is no law which requires a homicide investigator to take photographs of a homicide crime scene or a narcotics investigator to have suspected drugs tested by a laboratory, but virtually all investigators do these things because they are good law enforcement. As your colleagues, we urge you to continue assuring that the Brady Act is enforced.

Since the Brady Act came into effect, over 186,000 felons, fugitives, wife beaters, military deserters, drug addicts and other prohibited handgun purchasers have been denied handguns. It would be nothing short of a national tragedy if, that same

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number of prohibited individuals were able to purchase handguns because law enforcement officers stopped doing Brady background checks.

We recognize that there may be a very few places in this country where the CLEO makes the irresponsible decision not to run Brady checks. It's just common sense that we all keep doing whatever we can to keep murderers, rapists and ~~other~~ mentally unstable persons from obtaining handguns. The safety of all of us is better assured when Brady background checks are conducted.

Our request is simple: please join us in continuing to enforce the Brady Act.

Sincerely,

Reno / Rubin

Treasury Memo on Brady 2/20/94

The Court could hold in Mack v. United States that Brady's provision for law enforcement officers to conduct background checks of prospective handgun purchasers violates the Tenth Amendment. If so, three elements of the law could still remain standing -- Brady's 5-day waiting period, the requirement that gun dealers obtain a statement from purchasers concerning the proposed handgun sale, and transfer by gun dealers of the statement to State or local law enforcement officers. In this situation,

- Law enforcement officials would be able to continue to conduct criminal record checks of handgun purchasers on a voluntary basis.

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1. A statement by the President exhorting law enforcement officials that the Brady law is workable and encouraging them to continue conducting record checks on a voluntary basis.*

2. A letter from Secretary Rubin and Attorney General Reno to law enforcement colleagues, urging continued enforcement of the Brady Act. (Draft attached.) The letter could be sent electronically by ATF to all state and local law enforcement organizations, and also sent to state attorneys general.

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c. The decision need not disrupt the current process of conducting criminal background checks. Enactment of the Brady law was widely supported by the law enforcement community and it is anticipated that law enforcement officials will continue to make these checks. In those few areas where the courts have already held that law enforcement officials need not make Brady checks, the vast majority of those officials have continued to make the checks voluntarily.

d. Background checks on handgun buyers have proved their worth. Approximately [238,000] (BJS Bulletin, March 1997) felons and other categories of prohibited persons have been prevented from obtaining handguns from gun stores since the Brady law took effect.

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Kansas	North Dakota **	Texas **
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Louisiana **	Oklahoma **	West Virginia
Maine	Pennsylvania **	Wyoming

** In these States, the Federal 5-day waiting period does not apply to transfers of handguns to persons holding valid permits/licenses to carry handguns issued within 5 years of the proposed purchase.

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New Jersey	--	Permit or other approval-type system
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Oregon	--	Permit/Instant Check
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in those States where Brady's 5-day waiting period applies,

Dear Law Enforcement Colleague:

As you are no doubt aware, earlier today, the Supreme Court ruled that part of the Brady Handgun Control Act is unconstitutional. Although we are disappointed in the Court's decision, we must all, of course, abide by it.

We wanted to make certain that all of you understand that the Supreme Court decision did not "strike down the Brady Act," "declare it unconstitutional" or any one of a number of broad-based and inaccurate statements which you may hear. Rather, all the Court did is state that the Federal government cannot require that state, county and local officials conduct the checks provided for under the law.

We know that the vast majority of concerned and effective law enforcement officers in this country support the conduct of background checks under the Brady Act, not because they are ~~required but because -- plain and simple --~~ it is good law enforcement. Therfore, this decision ought to have little impact on law enforcement. Those who wish to purchase a handgun from a licensed firearms dealer (FFL) must still complete a form under the Brady Act and the FFL must still forward that form to the chief law enforcement officer (CLEO) ~~for the jurisdiction~~ where the purchaser resides. If, after five business days, the CLEO has not advised the FFL that the FFL may not transfer the handgun, and the FFL has no information that the purchaser is prohibited, the FFL may transfer the handgun to the purchaser ~~if the FFL has no information that the~~.

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We recognize that there may be a very few places in this country where the CLEO makes the irresponsible decision not to run Brady checks. It's just common sense that we all keep doing whatever we can to keep murderers, rapists and ~~other~~ mentally unstable persons from obtaining handguns. The safety of all of us is better assured when Brady background checks are conducted.

Our request is simple: please join us in continuing to enforce the Brady Act.

Sincerely,

Reno / Rubin

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Brady Supreme Court Decision
Questions and Answers
(date)

Q. What did the Supreme Court decide today on the Brady case ?

A. The decision left the majority of the Brady Handgun Control Act intact--the Court simply ruled that part of the Brady Act is unconstitutional. The Supreme Court stated that the Federal government cannot <u>require</u> state, country and local law officials to conduct the background checks provided for under the law. Police can, and we expect will, continue to complete background checks on handgun buyers voluntarily because it is a common sense law enforcement practice.

Q. What did the Brady Handgun Control Act require? What will it continue to require after the Court's decision?

A. The Brady Act requires all Federally-licensed firearms dealers (FFLs) to fill out a form for each prospective handgun purchaser. The FFL must then forward the form to the chief law enforcement officer in their jurisdiction. The Court left both of these provisions intact. If, after five days, the chief law enforcement officer has not advised the FFL not to transfer the gun to the purchaser, then the FFL may sell the handgun.

After today's decision, once the chief law enforcement officer receives the form from the FFL, the officer may choose to complete the background check on the potential gun purchaser on a voluntary basis. Nothing in the Court's decision prohibits a chief law enforcement officer from completing these checks-- it is just not legally required for them to do so.

Q. Does this mean that background checks will not be done on handgun purchasers?

A. We expect the vast majority of law enforcement officers to continue to conduct background checks. Nothing in the law prohibits law enforcement from voluntarily enforcing the Brady Act checks. More importantly, it is a smart law enforcement practice to confirm that the person trying to buy a handgun down the street isn't a violent felon, a fugitive from the law, stalker, or some other prohibited gun purchaser.

In addition, we expect major police organizations and chief law enforcement officers around the country to sign a pledge committing to continue doing Brady background checks voluntarily.

We recognize that in a few places, some law enforcement may choose not to enforce Brady background checks. We view this as an irresponsible decision, which could have the effect of jeopardizing the public's safety. We must continue to do everything we can to make sure that prohibited gun purchasers-- violent felons, rapists, minors--do not get access to guns.

Q. How many gun sales have been blocked by the Brady Act?

A. We estimate that 186,000 handgun sales have been blocked in the first 28 months of the Brady Act. About 6,600 gun sales are thwarted each month to prohibited purchasers such as felons, drug addicts, and stalkers thanks to Brady background checks. It would be a travesty to see guns fall into the hands of this same number of criminals--or even a single dangerous criminal-- because Brady background checks were not completed.

Q. Is the President going to do anything in light of the Supreme Court decision?

A. Yes. Today, the President is announcing a proposal...

The President believes that there should be no safe havens for prohibited gun purchasers. We must continue to do everything we can to be sure that people who are prohibited under law from owning a gun are thwarted in their attempts to buy one.

Q. What does the letter from the Attorney General and Secretary Rubin say?

A. The letter-- from the President's own chief law enforcement officers-- will be sent to law enforcement around the nation asking them to join us and continue to enforce the Brady Act. The letter provides clarification to law enforcement about what is still required under the Brady Act and what they may do voluntarily. This should help to avoid confusion and ensure that law enforcement who want to voluntarily complete background checks will continue to do so without any gaps in coverage.

Q. Isn't it true that even before the Supreme Court decision there were states that were not subject to the Brady Act?

A. Yes. The law permits states to use alternate criminal records checks systems as long as they meet the minimum standard established by the Brady Act. These X states already have instant background check systems in place or licensing requirements which exceed the standards set in Brady, and are therefore, not subject to Brady. These states are unaffected by today's decision.

However, the Court's decision does impact about half of the states. That is why we are seeking the continued commitment of all of the chief law enforcement in those states to conduct criminal background checks on handgun purchasers.

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The Court could hold in Mack v. United States that Brady's provision for law enforcement officers to conduct background checks of prospective handgun purchasers violates the Tenth Amendment. If so,and if the Court holds this portion of the law is severable, three elements of the law could still remain standing -- Brady's 5-day waiting period, the requirement that gun dealers obtain a statement from purchasers concerning the proposed handgun sale, and transfer by gun dealers of the statement to State or local law enforcement officers. In this situation,

- o Law enforcement officials would be able to continue to conduct criminal record checks of handgun purchasers on a voluntary basis.

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Options for responding:

1. A statement by the President exhorting law enforcement officials that the Brady law is workable and encouraging them to continue conducting record checks on a voluntary basis.*

2. A letter from Secretary Rubin and Attorney General Reno to law enforcement colleagues, urging continued enforcement of the Brady Act. (Draft attached.) The letter could be sent electronically by ATF to all state and local law enforcement organizations, and also sent to state attorneys general.

3. Telephone calls by the President and/or senior Administration officials including Under Secretary Kelly to the Governors of the 24 Brady states to urge that they support continued enforcement by local chief law enforcement officials.

4. In the event that some local chief law enforcement officers refuse to do background checks, ATF would attempt to identify state or local law enforcement officials who are willing to conduct background checks in those jurisdictions where the checks will not otherwise be performed. *Issue: does this create a disincentive for CLEOS to perform checks, thereby adding burdens to others? Or does this lead to one state CLEO where there wouldn't otherwise be one?*

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5. ATF Director Magaw would send a notification to Federal Firearms Licensees explaining the decision and noting that their obligations remain unaffected.

6. The Administration could introduce legislation that would limit an FFL to the sale of long guns in jurisdictions where checks were not being performed. *ATF comment/evaluation needed. Preliminary evaluation: works legally; need to address notice issue -- how ATF to know of CLEO practice and how to inform FFL.*

*The President could make the following points in his statement:

a. While the Court's decision is disappointing, important elements of the Brady law were left intact -- dealer's obtaining background statements from purchasers; dealers' notification to law enforcement officials of the intended purchase of handguns; and the 5-day waiting period prior to delivery.

b. The Court did not "strike down the Brady Act", "declare it unconstitutional" or any one of a number of broad and inaccurate statements that may be heard. Rather, the Court held that State and local officials cannot be <u>required</u> to conduct the checks provided for in the law.

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d. Background checks on handgun buyers have proved their worth. Approximately [238,000] (BJS Bulletin, March 1997) felons and other categories of prohibited persons have been prevented from obtaining handguns from gun stores since the Brady law took effect.

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f. Continued record checks under the Brady law are, plainly and simply, good law enforcement. We must not return to the old system under which many states made no effort to verify statements made by felons and other prohibited persons when they bought handguns from gun stores.

MEMORANDUM FOR THE PRESIDENT

FROM: RAHM EMANUEL
BRUCE REED

SUBJECT: STRATEGY IN RESPONSE TO BRADY LAW SUPREME COURT DECISION

The Supreme Court will decide the Brady Law case within the next few months. Most experts believe that the Court will find the law unconstitutional and hold that the Federal Government cannot "require" state and local law enforcement officials to conduct criminal background checks.

The Counsel's Office is providing you a memo with their views on legislative fix options. Here are recommended actions that we think we should take in response to such a ruling.

If Court Rules Brady Law Unconstitutional

Three elements of the law would most likely still be in effect --- 1) Brady's 5-day waiting period; 2) Requirement that gun dealers obtain a statement from purchasers concerning the proposed handgun sale; and 3) Transfer by gun dealers of the statement to state or local law enforcement officers. In addition, the decision would apply only to 24 Brady states, and not to the Brady "alternative" states (where state legislatures have established an alternative system that meets federal standards).

Law enforcement officials would be able to continue to conduct criminal record checks of handgun purchasers -- but only on a voluntary basis. And most law enforcement officials believe that the vast majority of local chief law enforcement officers would continue to perform background checks.

Actions To Take In Response

We have been working with the Justice and Treasury Departments to develop a multi-pronged strategy to respond to such a decision. It is critical that we move quickly to respond to an adverse ruling by the Court. These options will permit us to stand with the Bradys and law enforcement in a united front and challenge Congress and the gun lobby to support reinstating the Brady Law.

The communications message from this strategy would be straightforward - - the majority of the Brady Law is still intact, but criminals should have no safe haven. The law should be clear: no background check, no gun sale.

Day of Supreme Court Ruling

- Presidential Statement. You would make a statement at the White House with the Bradys condemning the decision and directing the Attorney General and the Secretary of Treasury to review the decision and within a week present you with legislative options.

Law Enforcement/Bradys Event

At an event, within a short period of the ruling, you would stand with the Attorney General, Secretary Rubin, numerous law enforcement chiefs and sheriffs, Members of Congress, and the Bradys to announce the following:

- Legislation. Announce legislation addressing the Court decision and challenge Congress to pass it quickly (in addition, Treasury is currently reviewing ~~any~~ whether actions could be taken by Executive Order in conjunction with or instead of legislation);

  A more definitive recommendation will depend upon an analysis of the Court's opinion. However, here are at least some preliminary options being consider~~ing~~ed by the Justice and Treasury Departments:

  1. Condition federal crime program funding ~~--~~ upon states and localities agreeing to abide by background check requirements. This option would provoke some resistance in the law enforcement community.

  2. Federal Operation --- turn over background check operations to the FBI and ATF.

  3. Regulate Firearms Dealers -- prohib~~it~~ a federally licensed firearms dealers from selling handguns unless a law enforcement official certifies that a background check will be conducted.

  4. No Legislative Response -- Brady is currently scheduled to sunset in 1998 and be replaced with a instant background check system; ~~and~~ any legislation will ~~unlikely~~ probably not pass ~~with~~ in this Congress.

We recommend option #3. We think it is important ~~that~~ you respond to the decision with legislation and challenge Congress to move. ~~They~~ It will then have to explain any inaction to law enforcement and the American public. Under option 3, Most chief law enforcement officers ~~are going to~~ will conduct background checks; ~~those~~ any who refuse will ~~have to explain why they don't to their gun owners -- because there will be no~~ have to take responsibility for halting all handgun sales in their area. ~~It~~ This approach sticks to a simple overall message -- no background check, no gun sale. Handgun Control supports this approach.

- Law Enforcement Pledge. Release a pledge signed by chiefs and sheriffs from across the nation vowing to continue to enforce the Brady Law.

- Reno/Rubin Letter. Release letter from Reno and Rubin to every police chief and sheriff in the country urging them to continue their public safety duty to conduct background checks on handgun purchasers. The letter would be sent electronically by Treasury to all state and local law enforcement organizations, and also sent to state attorneys general.

- ATF Letter. Release ATF Director Magaw letter to all Federal Firearms Licensees notifying them of the Court decision and informing them that their obligations under Brady remain unaffected.

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- ATF Letter. Release ATF Director Magaw letter to all Federal Firearms Licensees notifying them of the Court decision and informing them that their obligations under Brady remain unaffected.

DETERMINED TO BE AN ADMINISTRATIVE MARKING INITIALS: RCL DATE: 05/30/19 ~~CONFIDENTIAL~~

First Draft: Brady Op/Ed NOT FOR DISTRIBUTION

DRAFT

The U.S. Supreme Court's decision yesterday on the Brady law could have devastating effects on efforts to keep guns out of the hands of criminals—that is, if police allow it to happen. While the Court ruled that the federal government could not mandate police chiefs to make "reasonable efforts" to conduct background checks on people who buy handguns from federally licensed dealers, many law enforcement leaders in affected states are already organizing to do the background checks voluntarily. The majority of police chiefs in this country fought hard for the Brady law, background check and all, and disagree that its requirements are unduly burdensome. In Lenexa, Kansas, for example, it takes approximately ___ minutes to conduct a background check; but the time it takes to investigate a shooting can take _____, as well as the immeasurable costs in human suffering and loss of life. That is why the Police Executive Research Forum (PERF) joined several other national law enforcement groups in an amicus brief to the Court in support of the Brady law. Police chiefs know that the Brady law provided the kind of national approach needed to address a gun violence problem that is exacerbated by uneven responses among the states.

DRAFT

There are 28 states that have their own background check laws. So while the decision directly impacts only the remaining 22 states whose gun background checks are governed solely by the Brady law, the decision will have national impact. The Brady law set some national standards to ensure that federal firearms dealers would not transfer handguns to criminals and others who cannot legally possess them, gutting the practice of criminals' shopping for guns in states with no background checks and carrying them to states with stricter gun control provisions. The evidence suggested extraordinary success. According to the Justice Department's Bureau of Justice Statistics, in the first 28 months after Brady was enacted, more than 186,000 illegal gun sales were blocked by background checks. More than 70 percent of the estimated 6,600 attempts stopped each month are due to purchasers' being identified as indicted or convicted felons. That success will be undermined if no background checks are done in those 22 "Brady-only" states. While police have often fought the intrusion of the federal government in traditionally state and local crime issues, the Brady law was a shining example of when such a federal role is welcome.

Despite the arguments of those who challenged the Brady law on the narrow 10th Amendment federalism issue—that the Brady law commandeered their services as state officials to carry out federal policy—many police professionals disagree and will conduct these checks voluntarily. The Court did not rule that conducting background checks was unconstitutional, only that police couldn't be mandated to perform them as the Brady law is currently written. Police have few options: The instant check system, a national computer system for immediate checks on purchasers, is supposed to replace the Brady law in late 1998, but is not yet a reality. In fact, the Department of Justice reports that at the end of 1995 only one-third of the more than 52 million criminal history records were accessible instantly through a national system and complete with court disposition information. Until that system becomes operational, police in affected states will be called on to carry on the successes of the Brady law on their own. Already, ___PERF members in ___ of the 22 affected states have voiced their commitment to voluntarily continue background checks so long as the immunity provisions of the Brady law apply to their conducting these checks.

Opponents of Brady may have prevailed in this case, but cops and citizens everywhere are certain losers in the fight against gun violence if police are unable or unwilling to conduct these checks voluntarily, at least until a legislative fix can be passed that meets constitutional challenges and public safety needs. Brady and background checks generally may not be a panacea for gun violence, but they are a worthy investment of police resources. Police would rather conduct a background check now than a homicide investigation later.

Ellen Hanson
Lenexa, Kansas Chief of Police and
PERF Board Member

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Chuck Wexler
Executive Director
Police Executive Research Forum

PERF is a DC-based think tank and membership organization of progressive police chiefs and criminal justice professionals who serve more than 40 percent of the nation's population. The organization is committed to improving police practices through research, national leadership and debate.

Contact: Martha Plotkin, Director of Communications 202/466-7820 x232

DRAFT

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WASHINGTON, D.C. 20036
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POLICE EXECUTIVE RESEARCH FORUM

CHUCK WEXLER
EXECUTIVE DIRECTOR

MEMO

To: Dennis Burke
From: Martha Plotkin
Subject: Brady Supreme Court Decision
Date: April 21, 1997

As we discussed, to date I have received 15 commitments from police chiefs in 6 of the 22 Brady States to voluntarily conduct background checks, so long as the immunity provisions apply. They have provided me with the names of PIOs and record check staff for press purposes when the decision is released. In addition, I learned that in five states there is a designated agency that conducts the checks for all the PERF police chiefs in those states (about 25 to 30 PERF chiefs).

1. Arkansas State Police
2. Arizona Department of Public Safety
3. South Carolina State Law Enforcement Division
4. Kentucky State Police
5. Ohio Bureau of Criminal Investigations

A PERF chief in each of these states has contacted the state agency requesting a similar commitment. We contacted 64 chiefs and expect more call-backs from other states over the next week. We are trying to prepare a press release and op/ed for next Monday, the earliest we were told a decision could come down. I think you said you received a copy of the draft op/ed. Please feel free to share it with anyone that can identify any critical issues we may have overlooked.

Many of the police chiefs are reluctant to make a commitment because of the following concerns. Any information you can share with me that would address these issues would be helpful in garnering necessary support.

1. Some chiefs are concerned that they will not have access to NCIC for voluntary checks if the background provisions of the bill are struck. A New Mexico chief is concerned he won't have NCIC access and is already experiencing similar problems with conducting "school checks." One chief noted that Ohio chiefs cannot currently conduct these checks unless they are doing an official investigation: otherwise the state bureau of investigations conducts them. They fear that they cannot use their terminals to do the checks unless the Ohio rules of operations change or there is a state statute. I don't know much about how other states deal with NCIC access, but thought someone could advise me on whether this is going to be an issue we need to address.

2. Three of the chiefs I spoke to today reflected the comment made by this chief: "I have no means by which to conduct checks without cooperation from local gun shops--which I do not expect to get. [My] agency relies on shops to provide gun purchaser information and shops are uncooperative."

Chiefs are confused about whether gun shop owners will *be required to* request the background checks if the background check provision is struck down.

3. A few chiefs have said they were concerned with sec. 1983 suits if they do the checks. They are afraid the law enforcement immunity provision may still leave them open to litigation. It is not a matter of whether they will prevail, but whether they will have to bear the costs of litigation at all.

4. Several chiefs are concerned about voluntarily conducting the checks when a neighboring police agency does not. They are worried that purchasers will feel they are being discriminated against in their jurisdiction.

These seem to be the top four concerns. PERF would be more effective if we had some assistance in responding to these fears. We realize we are all limited by trying to guess what the final ruling will look like, but would like to prepare a substantive press statement that would include the police chiefs' commitment to do the checks. Obviously, we want to ensure that we are not saying anything inconsistent with the Administration's understanding of the issues or omitting any of the police liability issues. Let me know what you think. Thanks for taking the time to address our concerns.

cc: Chuck Wexler, Exec. Dir., PERF

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POLICE EXECUTIVE RESEARCH FORUM

CHUCK WEXLER
EXECUTIVE DIRECTOR

MEMO

To: PERF Members in Brady States
From: Chuck Wexler, Executive Director
Subject: Supreme Court Decision on Brady Law
Date: April 14, 1997

As many of you know, the U.S. Supreme Court will be rendering a decision as early as this week on the constitutionality of the Brady Law—the law that requires that chief law enforcement executives make reasonable efforts to conduct background checks within five days to determine if a purchaser can legally receive a handgun from a federally licensed dealer. A sheriff has challenged the Brady law on a 10th Amendment claim, suggesting that the background check is onerous and commandeers his services as a state official in furtherance of a federal program. The Police Executive Research Forum in congressional testimonies, amicus briefs and press conferences has supported Brady's background check since its first proposal, and does not believe its requirements are unduly burdensome. According to a recent Bureau of Justice Statistics report, an estimated 186,000 illegal sales were preempted in just the first 28 months following the Brady law's enactment. The report further indicated that 72 percent of aborted sales during the reporting period were attempted by convicted or indicted felons.

Because it is possible that the Supreme Court will strike down the background check portion of the law, **we would like to know if you would be willing to conduct these background checks voluntarily—even in the absence of the Brady law requirements. Your state is one of 22 states that is directly affected by the decision,** as the remaining states have legislation that serves as an alternative to or similar substitute for the Brady law.

We are anticipating that the waiting period, immunity for law enforcement personnel conducting the checks and other provisions of the Brady law will remain intact even if the background check is struck down. While we hope that a legislative fix will be proposed if the Supreme Court strikes down the background check provisions, in the interim there will be increased attention on those 22 states whose federally licensed dealers' sales are governed only by the current Brady law. There is some fear that failure to conduct background checks in one state may undermine neighboring states' efforts. **Please fax the attached form as soon as possible to Martha Plotkin at 202/466-7826.**

mp/press/brady22

Name____

Agency____

Phone Number_______________ Fax Number_______________

___Yes, I will continue to voluntarily conduct background checks if that provision of the Brady law is struck down.

___No, I will not continue to conduct background checks if that provision of the Brady law is struck down.

Comments:

___ I would like to be a spokesperson on this issue and agree to have PERF refer press inquiries on the subject to me.

Contact person who supervises background checks for your agency:

Name____

Agency____

Phone Number_______________ Fax Number_______________

Please fax as soon as possible to Martha Plotkin, Director of Communications and Legislative Affairs, at 202/466-7826, (phone: 202/466-7820, ext. 232). Thank you for taking the time to respond to this inquiry.

mp/press/brady22

First Draft: Brady Op/Ed NOT FOR DISTRIBUTION

The U.S. Supreme Court's decision yesterday on the Brady law could have devastating effects on efforts to keep guns out of the hands of criminals—that is, if police allow it to happen. While the Court ruled that the federal government could not mandate police chiefs to make "reasonable efforts" to conduct background checks on people who buy handguns from federally licensed dealers, many law enforcement leaders in affected states are already organizing to do the background checks voluntarily. The majority of police chiefs in this country fought hard for the Brady law, background check and all, and disagree that its requirements are unduly burdensome. In Lenexa, Kansas, for example, it takes approximately ___ minutes to conduct a background check; but the time it takes to investigate a shooting can take _____, as well as the immeasurable costs in human suffering and loss of life. That is why the Police Executive Research Forum (PERF) joined several other national law enforcement groups in an amicus brief to the Court in support of the Brady law. Police chiefs know that the Brady law provided the kind of national approach needed to address a gun violence problem that is exacerbated by uneven responses among the states.

There are 28 states that have their own background check laws. So while the decision directly impacts only the remaining 22 states whose gun background checks are governed solely by the Brady law, the decision will have national impact. The Brady law set some national standards to ensure that federal firearms dealers would not transfer handguns to criminals and others who cannot legally possess them, gutting the practice of criminals' shopping for guns in states with no background checks and carrying them to states with stricter gun control provisions. The evidence suggested extraordinary success. According to the Justice Department, in the first 28 months after Brady was enacted, more than 186,000 illegal gun sales were blocked by background checks. More than 70 percent of the estimated 6,600 attempts stopped each month are due to purchasers' being identified as indicted or convicted felons. That success will be undermined if no background checks are done in those 22 "Brady-only" states. While police have often fought the intrusion of the federal government in traditionally state and local crime issues, the Brady law was a shining example of when such a federal role is welcome.

Despite the arguments of those who challenged the Brady law on the narrow 10th Amendment federalism issue—that the Brady law commandeered their services as state officials to carry out federal policy—many police professionals disagree and will conduct these checks voluntarily. The Court did not rule that conducting background checks was unconstitutional, only that police couldn't be mandated to perform them as the Brady law is currently written. Police have few options: The instant check system, a national computer system for immediate checks on purchasers, is supposed to replace the Brady law in late 1998, but is not yet a reality. In fact, the Department of Justice reports that at the end of 1995 only one-third of the more than 52 million criminal history records were accessible instantly through a national system and complete with court disposition information. Until that system becomes operational, police in affected states will be called on to carry on the successes of the Brady law on their own. Already, ___PERF members in ___ of the 22 affected states have voiced their commitment to voluntarily continue background checks so long as the immunity provisions of the Brady law apply to their conducting these checks.

Opponents of Brady may have prevailed in this case, but cops and citizens everywhere are certain losers in the fight against gun violence if police are unable or unwilling to conduct these checks voluntarily, at least until a legislative fix can be passed that meets constitutional challenges and public safety needs. Brady and background checks generally may not be a panacea for gun violence, but they are a worthy investment of police resources. Police would rather conduct a background check now than a homicide investigation later.

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Contact: Martha Plotkin, Director of Communications 202/466-7820 x232

THE WHITE HOUSE

WASHINGTON

Dennis Burke
67431

To: Elena
62878

harles F. C. Ruff
ounsel to the President

ll Marshall
Associate Counsel to the President

Karen A. Popp
Associate Counsel to the President

DATE: April 4, 1997

REGARDING: Brady Bill Options

The following presents an overview of the various legislative options available to the Administration should the Supreme Court strike down the local law enforcement background check requirements of the Brady Law. As you will note, we have identified both the policy issues and the legal issues that are present in each alternative. The legal analysis can only be preliminary, however, because the constitutionality of any particular legislative proposal will depend on how the Supreme Court crafts its Brady Law decision. For this reason, the Justice Department has strenuously requested that the Administration not make any decision regarding possible legislative responses until there has been time to analyze the Supreme Court's decision.

I. OBJECTIVES

In assessing any possible response to an adverse judicial decision we should consider three separate, and potentially conflicting, objectives.

A. Policy -- advance the substantive policies of the Brady Bill of providing background checks for the purchasers of all handguns.

B. Political -- provide a clear answer to those claiming that the advancement of the policies advanced by the Brady Bill have been derailed.

C. Legal -- propose a legislative solution that is constitutionally sound and minimizes the opportunity for opponents to advance new and potentially damaging legal theories.

II. LEGISLATIVE OPTIONS

A. Quid Pro Quo Funding

This option would condition the receipt of federal monies for crime programs upon state and local communities agreeing to abide by the background check requirements.

1. Policy concerns. This option would provoke resistance in the law enforcement community. There are also some real world questions as to whether there are any programs to which compliance with the Brady Law could be realistically tied. Finally, there may also be a practical problem in that, for a variety of reasons including the normal timings of grant allocation, there may not be any grant monies to use as leverage for the relatively short period between the date of a Supreme Court opinion and late 1998 when the federal government will assume background check responsibilities.

2. Legal issues. Congress is generally free, under the Spending Clause, to use conditions on federal grants to states as a means of encouraging state action in the service of federally defined goals. Recent decisions, however, have identified two potential limitations on conditional spending power legislation. First, the purposes of the grant condition must be related to the purposes of the grant program. The more attenuated the connection between the purposes of Brady Law background checks and the conditional federal grants, the greater the risk of invalidation. Second, some judges have indicated a willingness to hold that legislation which withdraws funding, can under some circumstances, cross the line from encouragement to coercion and thereby violate constitutional principles of federalism. Although under current law a properly drafted spending program should survive constitutional scrutiny, such a law might also be used as a vehicle for opponents to test this 'coercion' principle.

B. Federal Preemptive Regulation in Noncomplying Jurisdictions

This option would impose on non-complying localities regulations which could work as alternatives to background checks in furthering Brady Law policies. Alternatively, imposition of these requirements might encourage non-complying localities to reconsider their options and voluntarily comply with the Brady Law itself.

Examples in this category include mandating a relatively long waiting period for gun purchasers which can only be shortened by completion of a background check. A second possibility is a requirement that guns may not be purchased at all in localities that do not voluntarily adopt background check requirements. A third option is to send all background checks for non-complying localities to federal agencies for whatever reasonable period it might take those federal agencies to complete those checks.

1. Policy concerns. The imposition of restrictions on the purchase of guns in non-complying communities could promote voluntary compliance with Brady; and if a locality

refused to comply, the new strictures could be an effective tool in checking the sale of handguns to persons with problematic backgrounds. On the other hand, the imposition of harsh strictures would impose penalties on those who would be otherwise eligible to purchase guns under Brady. In addition, providing disincentives for persons to buy guns in non-complying localities places the brunt of enforcement on arguably innocent third parties --gun dealers. Affecting third parties in this manner could provoke an unfavorable backlash.

2. Legal concerns. In areas where Congress has authority under the Commerce Clause to regulate private activity directly, it also has the authority to offer States a choice between regulating in conformity with federal standards or ceding the field to preemptive federal regulation. However, as with the spending power, noted above, the courts may rule that conditional Commerce Clause legislation might also be so coercive as to violate federalism concerns. Distinguishing permissible encouragement from unlawful coercion in this context is not clear. Although the federal government may impose genuine federal regulation in jurisdictions that fail to perform background checks, regulations designed to force States into assuming the responsibilities that Congress has assigned to them may be invalidated. Thus, mandating longer waiting periods in jurisdictions where local officers refuse to conduct background checks, would be suspectable to coercion claims if the delay were not justified.

C. Federal Operation of the System

This option would turn over the background check operation to the FBI or ATF immediately, or, if that is not feasible, would seek to move up the date that the FBI would assume operations.

1. Policy concerns. DOJ is unable to definitively determine when the FBI would be in a position to take over the background check operation. The time when such an appraisal can be made is also indeterminate. In addition, the cost of placing the responsibility for all background checks in the hands of the FBI at this time may be significant. DOJ is attempting to determine whether ATF may be currently in a position to assume the background check responsibilities.

2. Legal issues. This approach would rely on Congress' well established power to regulate gun sales in or affecting interstate commerce. It would not raise any significant constitutional issues.

D. Requiring Background Checks as a Precondition to Handgun Sales

This option would prohibit federally licensed firearms dealers from selling handguns unless the chief law enforcement official has certified that he/she will conduct a background check.

1. Policy concerns. This option places the brunt of enforcement on arguably innocent third parties -- gun dealers and persons otherwise eligible to purchase guns under Brady.

2. Legal issues. Congressional power to ban handgun sales altogether under the Commerce Clause presumptively includes the power to impose a ban selectively, where States and localities refrain from performing background checks. Absent coercion, as discussed above, a properly crafted provision should pass constitutional muster. In other words, as long as the federal controls are to ensure that prohibited persons are prevented from purchasing handguns, and not to coerce local authorities into conducting the background checks, the legislation would be constitutional.

E. No Legislative Response

1. Policy concerns. While there will undoubtedly be pressure to pursue a legislative response if there is an adverse Supreme Court decision, there are also policy reasons that militate against legislative action. These concerns deserve significant considerations.

a. First, an adverse decision raises essentially only timing concerns. The FBI is scheduled to take over the background check operation in late 1998.

b. Second, the Court's decision would apply only to 24 states (alternative systems that meet federal standards are already in place in the other jurisdictions) and even in those 24 states, many law enforcement officers have announced or are expected to announce that they will continue to voluntarily comply with Brady law requirements.

c. Third, a new legislative proposal is unlikely to pass.

d. Fourth, if a bill does pass it may play into the litigation strategy of the anti-gun control forces who would be free to pick and choose among federal court judges in an effort to obtain a favorable decision and a favorable precedent.

2. Legal issues. Not applicable.

III. TIMING OF A LEGISLATIVE RESPONSE

There has been some suggestion that the Administration propose a legislative response to an adverse Supreme Court decision on the day of that decision. As overriding concern, however, is that a cohesive and meaningful response must necessarily require serious study of the judicial opinion. Moreover, even if the response was well-thought out and adequately anticipated the Court's argument, an immediate cry for legislative intervention would likely be perceived as unduly reflexive and politically driven.

IV. ALTERNATIVES TO A LEGISLATIVE RESPONSE

In lieu of, or in addition to, the Administration could respond to an adverse Supreme Court decision by a communications event bringing together law enforcement officials who would agree to voluntarily enforce the Brady Law's provisions. The President could also issue a statement after the decision was rendered.

Department of Justice

FOR IMMEDIATE RELEASE
TUESDAY, FEBRUARY 25, 1997

BJS
202/633-3047

ABOUT 6,600 ATTEMPTS TO BUY GUNS THWARTED BY BACKGROUND CHECKS EACH MONTH SINCE BRADY LAW ENACTED

186,000 Blocked from March 1994 through June 1996

WASHINGTON, D.C. -- During the first 28 months of the Brady Act's effectiveness (March 1994 through last June) more than 186,000 illegal over-the-counter gun sales were blocked by background checks, the Justice Department's Bureau of Justice Statistics (BJS) announced today. Of the average 6,600 attempts stopped each month, more than 70 percent were rejected because they were indicted or convicted as felons. The data refer only to attempted purchases from licensed firearms dealers and do not indicate whether rejected purchasers later obtained a gun.

Based on BJS statistics covering specifically January 1996 through June 1996, gun dealers made more than 1.3 million inquiries about the potential eligibility of potential handgun buyers. The data contained specific reasons for rejections. Approximately 34,000, or 2.6 percent, were rejected for the following reasons in percentages:

(MORE)

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(MORE)

the National Instant Criminal Background Check System (NICS), which will be administered by the Federal Bureau of Investigation. It is to be established by November 1998, when the waiting period of the current system will be eliminated.

When the Brady Act took effect in February 1994, there were an average 3,100 monthly gun application rejections in the 32 states that the act required to follow its presale review procedures. From March 1994 through last June 30 there were 86,000 rejections of about 4.2 million applications or inquiries.

Federal law prohibits firearm sales to a person who--

- is under indictment for a crime punishable by imprisonment for more than one year or has been convicted of such a crime,
- is a fugitive from justice,
- is an unlawful user of a controlled substance,
- has been adjudicated as mentally defective or has been committed to a mental institution,
- was dishonorably discharged from the armed forces,
- has renounced United States citizenship,
- is subject to a court order restraining him or her from harassing, stalking or threatening an intimate partner or a child, or
- is a person who has been convicted of domestic violence.

The bulletin, "Presale Firearm Checks" (NCJ-162787), was

(MORE)

U.S. Department of Justice
Office of Justice Programs

Bureau of Justice Statistics
Bulletin

February 1997, NCJ 162787

A National Estimate

Presale Firearm Checks

By Don Manson
Bureau of Justice Statistics

Gene Lauver
Regional Justice Information Service

On average each month an estimated 6,600 firearm purchases were prevented by background checks of potential gun buyers during the 28 months after the effective date of the Brady Handgun Violence Prevention Act. The checks revealed purchasers' ineligibility under Federal or State laws to buy a handgun or other firearm. Over 70% of the rejected purchasers were convicted or indicted felons.

Between March 1994 and June 1996, for all States together, there were almost 9 million applications to purchase firearms and an estimated 186,000 rejections. The data do not indicate whether rejected purchasers later obtained a firearm through other means.

Highlights

Presale firearms checks: Estimates of inquiries and rejections

	Bureau of Alcohol, Tobacco and Firearms[a]				Bureau of Justice Statistics[b]	
	3/1/94-12/31/94		1/1/95-12/31/95		1/1/96-6/30/96	
	All States	Original Brady States[c]	All States	Original Brady States[c]	All States	Original Brady States[c]
Inquiries and rejections						
Inquiries/applications	3,679,000	1,696,000	4,009,000	1,884,000	1,308,000	570,000
Rejected	92,000	42,000	60,000	28,000	34,000	16,000
Rejection rate	2.5%	2.5%	1.5%	1.5%	2.6%	2.8%
Reasons for rejection						
Felony indictment / conviction	65,000	30,000	43,000	20,000	24,000	13,000
Other	26,000	12,000	17,000	8,000	9,000	3,000

Note: All estimated counts are rounded. Percentages were calculated from unrounded data. Detail may not add to total because of rounding.
[a]Information was provided by the Bureau of Alcohol, Tobacco and Firearms. The estimates include all types of guns.
[b]Based on 176 sources in 44 States. The estimates reflect only applications for purchase of handguns.
[c]Original Brady States are the 32 States required to follow presale review procedures set out in the Brady Act when it became effective on February 28, 1994. (See the table on page 3.)

- Presale background checks of persons applying to buy a handgun or long gun resulted in about 6,600 rejections each month. This estimate, covering the period between March 1, 1994, and June 30, 1996, includes both States operating under the Brady Handgun Violence Prevention Act (Brady States) and States with comparable statutes preventing gun sales to prohibited persons (Brady-alternative States).

- More than 7 in 10 of the rejections occurred when potential buyers were found to have had a felony conviction or to be under felony indictment.

purchasers of all firearms. The background check will determine, based on available records, if an individual is prohibited under the Federal Gun Control Act or State law from receiving or possessing firearms.

Under the "permanent provisions" of the Brady Act, presale inquiries will be made through the National Instant Criminal Background Check System (NICS). The act requires the NICS, which will be operated by the FBI, to be established no later than November 1998. At that time the procedures related to the waiting period of the interim system will be eliminated.

Under the FBI's proposed NICS configuration, State criminal history records will be provided through each State's central repository and the Interstate Identification Index. The index, maintained by the FBI, points instantly to criminal records that States hold. In addition, the FBI will provide records of Federal offenses, Federally maintained State data, and Federal data on nonfelony disqualifications. States responding to NICS inquiries for nonfelony prohibitions will provide their records directly.

The National Criminal History Improvement Program (NCHIP)

To ensure immediate availability of complete and accurate State records, the Brady Act established a grant program authorized at $200 million. The program is to assist States to develop criminal history record systems and improve the interface with the NICS.

A major goal of the grant program is the interstate availability of complete State records when the NICS is implemented. Toward this goal, over $112 million was awarded in direct awards to States during fiscal years 1995 and 1996. NCHIP program funds have also supported direct technical assistance to States, evaluation, and related research.

Gun purchaser background checks, by State, 1996

State	Brady State (Y) Original (3/1/94)	Brady State (Y) 6/30/96	Number of law enforcement contacts responsible for record checks*	State data bases being accessed: Criminal histories	Wanted fugitives	Re-straining orders	Mental health
Alabama	Y	Y	67	Y	Y		
Alaska	Y	Y	35	Y	Y		
Arizona	Y	Y	1	Y	Y		
Arkansas	Y	Y	1	Y	Y		
California			1	Y	Y	Y	Y
Colorado	Y		1	Y	Y	Y	
Connecticut			1	Y		Y	
Delaware			1	Y	Y		Y
Florida			1	Y	Y	Y	
Georgia	Y		1	Y	Y		Y
Hawaii			4	Y	Y		Y
Idaho	Y		1	Y	Y	Y	
Illinois			1	Y	Y		Y
Indiana			1	Y			
Iowa			99	Y	Y	Y	Y
Kansas	Y	Y	123	Y			
Kentucky	Y	Y	1	Y	Y	Y	
Louisiana	Y		59	Y			
Maine	Y	Y	128	Y	Y		
Maryland			1	Y	Y		
Massachusetts			270	Y	Y		Y
Michigan			625	Y	Y		
Minnesota	Y		568	Y	Y		Y
Mississippi	Y	Y	263				
Missouri			115	Y	Y		
Montana	Y	Y	59	Y	Y		
Nebraska			95	Y	Y		
Nevada	Y	Y	1	Y	Y		
New Hampshire	Y		1	Y	Y	Y	
New Jersey			490	Y	Y	Y	Y
New Mexico	Y	Y	112	Y			
New York			58	Y	Y		
North Carolina	Y		98	Y	Y		
North Dakota	Y	Y	53	Y	Y		
Ohio	Y	Y	1	Y	Y		
Oklahoma	Y	Y	440	Y			
Oregon			208	Y	Y		Y
Pennsylvania	Y	Y	67	Y			
Rhode Island	Y	Y	39	Y	Y		
South Carolina	Y	Y	1	Y	Y		
South Dakota	Y	Y	66	Y	Y	Y	
Tennessee	Y		96	Y		Y	
Texas	Y	Y	991	Y	Y		
Utah	Y		1	Y	Y		
Vermont	Y	Y	22	Y	Y	Y	
Virginia			1	Y	Y	Y	
Washington	Y		291	Y	Y		
West Virginia	Y	Y	1	Y	Y	Y	
Wisconsin			1	Y	Y		Y
Wyoming	Y	Y	40	Y	Y		
Total	32	22	5,602	49	41	14	11

*In the Brady States contacts are the chief law enforcement officers (CLEO's); in Brady-alternative States these contacts are identified according to criteria of each State.

Source: *Survey of State Procedures Related to Firearm Sales*, BJS, May 1996 (NCJ-160763).

(7) To evaluate properly the application and rejection rates for purchasing populations within a given area, the appropriate CLEO was identified.

(a) If cities within a participating county CLEO were acting as their own CLEO's, their populations were subtracted from the county population.

(b) If a municipal CLEO was discovered to be providing services for other selected municipalities, then populations for those municipalities were added to the population of the city having the CLEO.

(c) Those CLEO's selected to participate in the study but found to be relying on other jurisdictions to conduct background checks were replaced by those other jurisdictions (for example, a town being replaced by a county).

(8) Maine has local CLEO's; however, Maine's data came from the State police that serve 40% of the State's population. The State police data were split into A and B categories based on the proportion of the Maine population in each category.

(9) Connecticut did not submit any data in time for this study. Connecticut has both local and State CLEO's, but for the purposes of this study, Connecticut was classified as a State CLEO.

(10) National estimates exclude the District of Columbia and U.S. territories. Sales of firearms are prohibited in the District of Columbia except to law enforcement officers.

The Bureau of Justice Statistics is the statistical agency of the U.S. Department of Justice. Jan M. Chaiken, Ph.D., is director.

BJS Bulletins present the first release of findings from permanent data collection programs. Don Manson, BJS Program Manager, and Gene Lauver, manager of the Firearm Inquiry Statistics program, Regional Justice Information Service (REJIS), wrote this Bulletin under the supervision of Carol Kaplan, Chief, National Criminal History Improvement Programs, BJS. REJIS of St. Louis, MO, collected and analyzed the FIST data presented. The Bureau of Alcohol Tobacco and Firearms assisted with background and analysis. Darrell Gilliard provided statistical verification. Tom Hester produced and edited the report. Marilyn Marbrook, assisted by Yvonne Boston and Jayne Pugh, administered final report production.

Further information about the Firearm Inquiry Statistics (FIST) program may be obtained from Carol Kaplan, BJS, or Gene Lauver, REJIS, 4255 West Pine Blvd., St. Louis, MO. 63108.

February 1997, NCJ-162787

This report and others from the Bureau of Justice Statistics are available through the Internet —

http://www.ojp.usdoj.gov/bjs/

3/22/95

Brady Law

Briefing Paper

The Brady Handgun Violence Prevention Act (Public Law 103-159), known as the Brady Law, was signed by the President on November 30, 1993. Provisions of the law include:

-- A waiting period of up to 5 working days and a background check of buyers by State or local enforcement agency prior to purchase of handguns from dealers in states that must meet this requirement. An instant check system will replace the waiting period in 1998.

-- The fee for a 3-year license for gun dealers and pawnbrokers increased to $200 from $30. The renewal fee increased to $90 from $30 for 3 years.

-- It is now a Federal crime to steal firearms from the inventory of Federal Firearms Licensees.

-- Dealers must submit reports to State or local enforcement agencies when selling 2 or more handguns within 5 working days.

-- Common carriers are barred from identifying packages containing firearms. Written receipt is required for interstate and foreign deliveries of firearms.

The Brady Law is working. It has stopped prohibited persons (convicted felons, fugitives from justice, persons under indictment, persons subject to a restraining order for alleged domestic violence, illegal drug users, persons who have been adjudicated "mentally defective," persons who have renounced their U.S. citizenship, persons who have been dishonorably discharged from the military, and illegal aliens) from buying handguns from Federal firearms licensees.

On February 28, 1995, the Treasury Department released, "One-Year Progress Report: Brady Handgun Violence Prevention Act." A survey of 30 law enforcement authorities indicated that more than 15,500, or approximately 3.5 percent, of the persons who applied to purchase handguns are denied to about 2 percent of applicants. The Bureau of Alcohol, Tobacco and Firearms (ATF) estimates that the number of applications to purchase handguns that were denied in Brady states nationwide was approximately 41,000. These denial rates were achieved without affecting the overall volume of handgun sales. This suggests that the Brady Law is accomplishing its goal - keeping handguns out of the reach of that small percentage of persons who use handguns criminally, while not unduly inconveniencing the law-abiding handgun owners.

Brady Law (Continued)

Under the Brady Law, there is no requirement for a CLEO and an FFL to advise ATF that a person attempting to purchase a handgun is a prohibited person.

The CLEO must make a reasonable effort to conduct a background check, including a National Crime Information Center check. The CLEO is not required by law to notify FFLs of the results of the background check. The CLEO only needs to advise the FFL that the transfer of a handgun would or would not violate the law. If the CLEO determines that a person is prohibited and such person requests the CLEO to provide the reason for such determination, the officer shall provide such reason in writing within 20 business days after receipt of the request.

The CLEO is required by law to destroy records, material statements, and any information created from records pertaining to the purchase of a handgun by an individual who is not prohibited from purchasing a handgun within 20 business days after the date the individual made the statement.

Brady was never intended to be a vehicle to show increased federal prosecution as a measure of success. Brady was intended to allow state and local law enforcement to respond effectively in their communities, with the ultimate goal of preventing prohibited persons from obtaining firearms.

Violations:

A person who completes ATF Form 5530.35, Statement of Intent to Obtain a Handgun and is found to be a prohibited person by the Chief Law Enforcement Officer (CLEO) of the State, is in violation of 18 U.S.C. section 922(a)(6) and 18 U.S.C., chapter 47, section 1001. As prescribed in 18 U.S.C., chapter 44, section 924 (a)(1)(B), whoever knowingly violates subsection (a)(6) of section 922, shall be fined not more than $5,000, imprisoned not more than 5 years, or both.

Title 18 U.S.C., chapter, section 922(s), an amendment to the Gun Control Act of 1968, outlines the procedures and restriction in which a Federal firearms licensee (FFL) and the CLEO may conduct themselves with potential purchasers of handguns. This amendment went into affect on February 28, 1994. As prescribed in 18 U.S.C., chapter 44, section 914(a)(5), whoever knowingly violates subsection (s) of section 922, shall be fined not more than $1,000, imprisoned not more than 1 year, or both. This statute applies only to the FFL.

Brady Law (Continued)

Title 18 U.S.C., chapter 47, section 1001, states that whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both.

DEPARTMENT OF THE TREASURY

BUREAU OF ALCOHOL, TOBACCO & FIREARMS

One-Year Progress Report:

Brady Handgun Violence Prevention Act

February 28, 1995

DEPARTMENT OF THE TREASURY
WASHINGTON

UNDER SECRETARY

February 28, 1995

The Honorable Robert E. Rubin
Secretary
Department of the Treasury
Washington, DC 20220

Dear Mr. Secretary:

The attached report sets forth the findings of a recently completed survey conducted by the Treasury Department's Bureau of Alcohol, Tobacco and Firearms (ATF) regarding the impact of the Brady Law. The survey, a precursor to a broader Department of Justice study regarding pre-purchase screening of firearms, covers the first year of Brady's implementation, and contains information voluntarily submitted by 30 law enforcement authorities across the country.

The results of this study are extremely promising. More than 15,500, or approximately 3.5 percent, of the persons who applied to purchase handguns in the surveyed jurisdictions had their applications denied because they were convicted felons, fugitives from justice, persons subject to a restraining order for alleged domestic violence, or other prohibited persons. ATF estimates that the number of applications to purchase handguns that were denied in Brady states nationwide was approximately 41,000. Significantly, ATF reports that these denial rates were achieved without affecting the overall volume of handgun sales. This suggests that the Brady Law is accomplishing its goal -- keeping handguns out of the reach of that small percentage of persons who use handguns criminally, while not unduly inconveniencing law-abiding handgun owners.

Anecdotal evidence emerging from the recent ATF survey, and an earlier ATF study assessing the efficacy of the Brady Law during its first 100 days, illustrates vividly that the Brady Law is working. Brady has alerted law enforcement authorities to attempts by convicted and potential offenders to purchase handguns -- including convicted rapists, murderers and drug dealers, as well as suspected spouse abusers.

The Office of Enforcement and ATF will continue to monitor the Brady Law's impact as implementation proceeds.

Sincerely,

Ronald K. Noble
Under Secretary
(Enforcement)

I. OVERVIEW

The Brady Law is working. One year after the Brady Handgun Violence Prevention Act became effective, the evidence indicates that Brady is doing what it was designed to do — keeping handguns out of the reach of the "bad guys," that small percentage of the population using handguns criminally, while not unduly infringing on the rights of legitimate handgun owners.

A recently completed survey of 30 law enforcement authorities conducted by the U.S. Treasury Department's Bureau of Alcohol, Tobacco and Firearms, a precursor to a broader Department of Justice/Bureau of Justice Statistics study, reveals that from March 1994 through January 1995, *more than 15,500 persons* who applied to purchase handguns in the surveyed jurisdictions had their applications denied. The bad guys blocked by Brady from obtaining handguns included:

4,365	**Convicted felons;**
945	**Fugitives;**
97	**Persons under indictment;**
649	**Illegal drug users;**
2	**Juveniles; and**
63	**Persons under restraining order for alleged stalking, harassment or other forms of domestic threats or intimidation.**

The more than 15,500 Brady applications denied represent *only 3.5 percent* of the total number of applications submitted in the surveyed jurisdictions. ATF has confirmed through discussions with the firearms industry that the overall volume of handgun sales remained relatively constant during the survey period. This suggests that *the Brady Law effectively is preventing the criminal element from accessing handguns, and is doing so with minimal inconvenience to law-abiding handgun owners.*

Brady Successes

- *In Boston, Massachusetts, a suspect who was arrested and indicted on gun-trafficking charges informed ATF that the Brady Law prompted him to cease his illegal conduct. The suspect, along with his partner, allegedly flooded the city of Boston with illegally sold handguns originally purchased in the Atlanta area between December 1993 and February 1994. When apprehended, the suspect told ATF that he halted his operations in February 1994 because he knew that the soon to be implemented Brady Law would permit pre-handgun transaction checks of his criminal record.*
- *During the first three months of the Brady Law, the Ohio Attorney General's office conducted 16,499 background checks. It reported that 129 convicted felons — among them convicted rapists, murderers and drug dealers — were prohibited from purchasing handguns.*

This report presents the results of the recent ATF study on the Brady Law, and of an earlier-released ATF survey tracking the Brady Law during the first 100 days following its inception. The report also provides an estimate of the number of denials of applications to purchase handguns in Brady states nationwide, based on records of inquiries made to the Federal Bureau of Investigation's criminal history database.

II. THE BRADY LAW

Nearly 7.5 million firearms are sold through retail outlets in the United States annually. Of these, almost half are handguns. Prior to February 28, 1994, the effective date of the Brady Law, there was no nationwide system in place to prevent handgun purchases by persons legally precluded from owning such weapons. The prospective purchaser merely had to sign a statement attesting that he or she was not legally forbidden from purchasing a firearm. There was no nationwide system through which law enforcement officials could confirm that representation.

The Brady Law ameliorates the earlier, ineffective system by requiring that every retail sale of a handgun be referred to law enforcement for a possible background check. Under Brady, a prospective handgun purchaser must fill out a form, commonly called the Brady Form (see Appendix), stating that he or she intends to purchase a handgun, and certifying that he or she does not fall within one of several enumerated categories of persons prohibited from making such a purchase. Prohibited persons include convicted felons, illegal drug users, persons under indictment, fugitives, illegal aliens, and persons subject to a restraining order for alleged domestic violence.

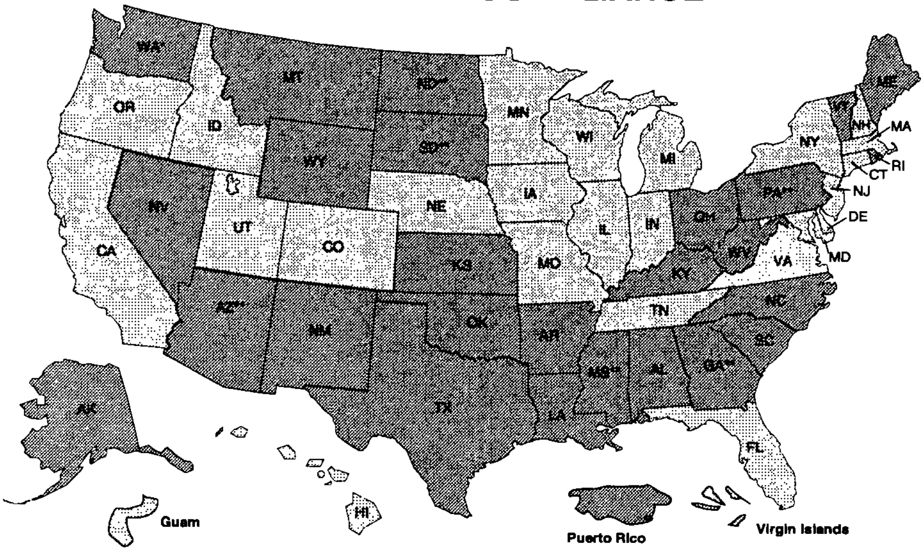
Brady Successes

- *In March 1994, the Brady Law prevented an accused stalker in Prairie Village, Kansas, from purchasing a handgun. The attempted handgun purchase was stopped by the Prairie Village Police Department when a Brady background check conducted by the Department revealed that the prospective purchaser, who was the subject of a restraining order for allegedly stalking his wife and threatening to kill her, was a resident of Missouri, not Kansas, as he had represented in his Brady Form.*
- *In April 1994, a handgun sale in Lexington, Kentucky was stopped by the Kentucky State Police when a Brady background check revealed that the intended purchaser was under indictment on felony cocaine charges. The Brady check also revealed that the purchaser had a previous felony conviction in Kansas for a "terroristic threat" offense.*

The gun dealer must transmit the Brady Form to the Chief Law Enforcement Officer of his or her particular jurisdiction within 24 hours. The Chief Law Enforcement Officer then makes a reasonable effort to ascertain within five business days whether receipt or possession of a handgun would be in violation of the law. If the Chief Law Enforcement Officer or his or her designee does not inform the dealer within five working days that the proposed sale cannot go forward, the sale may be consummated.

The Brady Law establishes exemptions to the background check provisions in states that already require a permit to purchase a handgun, or in states that already have in place a background check system comparable to Brady's. To date, 27 states and territories are subject to the Brady Law. One of these, Washington, presently is considering legislation which would remove it from Brady's purview.

BRADY LAW COMPLIANCE



States which must comply with the Federal 5-day waiting period
States which meet one of the alternatives to the Federal 5-day waiting period.

Note: *Legislation pending to qualify as an "alternate state."
**Federal 5-day waiting period does not apply to persons with valid permits/licenses to carry handguns issued within 5 years.

The five-day waiting period the Brady Law establishes is scheduled to terminate in 1998, at which time an automated "instant check" system is to be in place. The Department of Justice is responsible for developing the instant check system which, in addition to its use in regulating handgun purchases, will be employed for a variety of law enforcement purposes. ATF is working with the Justice Department on the development of this system. Currently, eight states — Colorado, Delaware, Florida, Idaho, New Hampshire, Utah, Virginia and Wisconsin — operate their own instant check systems.

Other elements of the Brady Law include: an increase in the fee for a three-year license for gun dealers and pawnbrokers from $30 to $200 (the renewal fee for such licenses also is increased from $30 to $90); a provision making it a federal offense to steal firearms from the inventories of firearms licensees; and a prohibition against common carriers identifying packages containing firearms.

III. ATF BRADY LAW ANNIVERSARY SURVEY

The Brady Law itself does not authorize ATF to require any kind of reports from federal firearms licensees concerning Brady's impact or implementation. The statute provides no mechanism for monitoring trends in handgun purchases and denials. To assess the Brady Law's efficacy, therefore, ATF solicited the voluntary cooperation of 30 law enforcement officials. Drawn from every region of the country, communities large and small, rural and urban, the survey group was structured to represent a cross section of the nation's law enforcement scene. Each of the participating law enforcement authorities agreed to disclose to ATF information regarding the Brady pre-handgun purchase screening process in their particular jurisdiction. The data collected included the number of applications to purchase handguns submitted to the law enforcement officials since Brady went into effect, the number of applications denied, and the grounds for the denials.

Table 1 below sets forth the number of applications for handgun purchases that were submitted during the relevant period and the corresponding number of denials, as reported by the law enforcement officials surveyed.

Table 1
Brady Law Anniversary Survey
(for the period 3/1/94 through 1/31/95)

Location • **Law Enforcement Authority Surveyed**	**Number of Brady Applications Initiated**	**Number of Applications Denied**	**Denial Rate (%)**
Alabama			
• Jefferson County Sheriff's Department	19,646	964	4.9
Alaska			
Anchorage Police Department	6,960	111	1.6
Arizona			
• Phoenix Police Department	28,708	1,718	6.0
• AZ Department of Public Safety	32,374	776	2.4

continued

Location • Law Enforcement Authority Surveyed	Number of Brady Applications Initiated	Number of Applications Denied	Denial Rate (%)
Arkansas			
• Arkansas State Police	25,434	472	1.8
Georgia			
• DeKalb County Police Department	4,685	680	14.5
Kansas			
• Elk County Sheriff's Department	15	0	0
Kentucky			
• Kentucky State Police	58,474	2,030	3.5
Louisiana			
• Superintendent of Police, New Orleans Parish	5,337	607	11.4
Maine			
• Lewiston Police Department	190	6	3.1
Mississippi			
• Rankin County Sheriff's Department	1,150	24	2.1
Montana			
• Yellowstone County Sheriff's Department	698	12	1.7
• Billings Police Department	1,519	11	.7
Nevada			
• Department of Motor Vehicles and Public Safety	33,550	522	1.5
New Mexico			
• Albuquerque Police Department	5,338	192	3.6
North Carolina			
• Rowan County Sheriff's Department		NO DATA AVAILABLE	
North Dakota			
• Cass County Sheriff's Department	735	9	1.2
Ohio			
• Bureau of Criminal Identification	61,074	447	.7

continued

Location • Law Enforcement Authority Surveyed	Number of Brady Applications Initiated	Number of Applications Denied	Denial Rate (%)
Oklahoma			
• Oklahoma City Police Department	9,197	165	1.8
Pennsylvania			
• Philadelphia Police Department	10,238	487	4.7
Puerto Rico			
• Superintendent of Police	5,390	150	2.8
Rhode Island			
• Providence Police Department	175	10	5.7
South Carolina			
• South Carolina Law Enforcement Division	55,171	2,199	4.0
South Dakota			
• Minnehaha County Sheriff's Department	236	6	2.5
Texas			
• Harris County Sheriff's Department	10,139	1,117	11.0
• Houston Police Department	32,137	2,442	7.6
Vermont			
• Montpelier Police Department	38	2	5.3
Washington			
• Seattle Police Department	6,213	154	2.5
West Virginia			
• West Virginia State Police	25,712	182	.7
Wyoming			
• Cheyenne Police Department	1,012	11	1.1
Total	**441,545**	**15,506**	**3.5**

IV. THE BRADY LAW 100-DAY SURVEY

On July 27, 1994, the Treasury Department released the results of an earlier ATF study assessing the impact of the Brady Law during the first 100 days of its implementation. In this study, ATF surveyed 70 of the largest federally licensed firearms dealers in nine cities: Abilene, Texas; Atlanta, Georgia; Cleveland, Ohio; Houston, Texas; Louisville, Kentucky; Pittsburgh, Pennsylvania; Providence, Rhode Island; Seattle, Washington; and Shreveport, Louisiana. ATF also polled 16 law enforcement authorities in the same locations.

> ***Brady Successes***
>
> - *In April 1994, a suspected drug dealer was arrested in San Antonio, Texas, after a Brady background check performed by the Uvalde County Sheriff's Office indicated that the alleged dealer was the subject of outstanding warrants for possession of cocaine with intent to distribute, possession of heroin with intent to distribute and failure to appear in court.*
> - *In June 1994, a person convicted for reckless homicide was prohibited from purchasing a handgun in Lexington, Kentucky when the Kentucky State Police discovered the felony conviction during the Brady application process. Prior to the enactment of the Brady Law, that same convicted felon was able to make two handgun purchases and still escape detection by law enforcement officials.*

The 100-day study revealed that 5.3 percent of the applications to purchase firearms submitted to the surveyed gun dealers during the relevant period had been denied. The chief law enforcement officers polled, however, reported a 4.7 percent cumulative denial rate. This apparent discrepancy can be attributed to two factors. First, not all gun dealers in the participating cities were surveyed. In addition, the law enforcement officers contributing to the study performed background checks on residents of their jurisdictions who bought handguns guns from dealers in *other* jurisdictions, as well as residents who purchased handguns from local dealers.

Table 2 sets forth the number of applications for handgun purchases that were submitted during the relevant period and the corresponding number of denials, as reported by the law enforcement officials and gun dealers surveyed.

Table 2
100 Day Survey Results

Gun Dealer 100 Day Survey

Survey City	Number of Gun Dealers Interviewed	Number of Applications Initiated	Number of Applications Denied	Denial Rate (%)
Houston, TX	5	2,104	345	16.4
Louisville, KY	10	1,670	100	6.0
Seattle, WA	8	2,135	9	.4
Pittsburgh, PA	10	2,204	39	1.8
Providence, RI	5	113	13	11.5
Abilene, TX	8	437	6	1.4
Atlanta, GA	10	1,385	33	2.4
Shreveport, LA	9	1,377	65	4.7
Cleveland, OH	5	302	14	4.6
Total	**70**	**11,727**	**624**	**5.3**

Law Enforcement Officers 100 Day Survey

Survey City	Number of Law Enforcement Officers Interviewed	Number of Applications Initiated	Number of Applications Denied	Denial Rate (%)
Houston, TX	3	12,832	1,220	9.5
Louisville, KY	1	17,440	624	3.6
Seattle, WA	1	2,200	36	1.6
Pittsburgh, PA	1	8,600	533	6.2
Providence, RI	1	348	5	1.4
Abilene, TX	1	501	12	2.4
Atlanta, GA	5	7,054	365	5.2
Shreveport, LA	2	1,835	100	5.4
Cleveland, OH	1	13,622	113	.8
Total	**16**	**64,432**	**3008**	**4.7**

V. NATIONWIDE ESTIMATED DENIALS BASED ON FIREARM CRIMINAL RECORD QUERIES THROUGH III

The FBI's criminal history database, the Interstate Identification Index ("III"), provides an accounting of the number of queries of the database made by law enforcement authorities in connection with firearms transactions. Generally speaking, the first step a law enforcement officer takes in processing a Brady application is to check the information disclosed in the application against a prospective purchaser's criminal record maintained in the III. When the initial check reveals that an intended purchaser may be prohibited from buying a gun, the officer usually will run a follow-up query to obtain the criminal record and confirm independently whether the individual is prohibited from purchasing a firearm. This makes III checks a rough but useful measurement of the number of possible denials of handgun purchases under Brady. Indeed, estimates based on III can be characterized as quite modest, since III only identifies felony convictions, pending indictments or fugitive status. III contains no information bearing on whether a putative purchaser falls within one of the remaining six categories of persons prohibited from buying handguns.

Brady Successes

- *In the summer of 1994, the Brady Law prevented an accused wife beater in Beaver County, Pennsylvania from obtaining several handguns. The putative purchaser, who was the subject of spousal assault charges in both New York and Pennsylvania, was denied access to the guns when a Brady background check performed by the Beaver County Sheriff uncovered the outstanding charges.*
- *In November 1994, the Brady Law was instrumental in securing the apprehension of two gang members, both convicted felons, who traveled from California to Nevada to purchase handguns. An investigation conducted by ATF's Reno, Nevada field office, with the assistance of the Nevada Division of Investigation, revealed that the suspects sought to purchase arms using false identification.*

As Table 3 on the following page indicates, during the period from March 1, 1994 through January 31, 1995, approximately 1.6 million queries made in Brady states resulted in follow-up queries. ATF estimated, conservatively, that no more than 2.5 percent of those follow-up queries actually uncovered facts leading law enforcement to nullify a pending handgun transaction. The 2.5 percent figure was based on historical rates of denials realized in certain states that had their own laws requiring pre-handgun purchase screening. Using this formula, the number of convicted felons, drug offenders, fugitives and other prohibited persons estimated to have been prevented from obtaining handguns was approximately 41,000.

Table 3
"III" Criminal History Database Queries
(for the period 3/1/94 through 1/31/95)

States/Territories	Firearms† Transactions Checks	Second Level Queries	Potential Denials (%)
Alabama (B)	155,818	9,812	6.3
Alaska (B)	15,041	2,240	14.9
Arizona (B)	141,726	15,249	10.8
Arkansas (B)	30,278	775	2.6
California	724,972	13	0.0
Colorado	73,398	9,015	12.3
Connecticut	30,190	3,058	10.1
Delaware	18,046	957	5.3
District of Columbia***	0	0	0.0
Florida	291,573	28,707	9.8
Georgia (B)	81,926	24,969	30.5
Hawaii	8,436	946	11.2
Idaho	34,874	4,030	11.6
Illinois	407,800	2,609	0.6
Indiana	49,426	2,893	5.9
Iowa	18,886	1,749	9.3
Kansas (B)	24,326	3,644	15.0
Kentucky (B)	64,294	5,954	9.3
Louisiana (B)	51,607	5,352	10.4
Maine (B)	11,238	605	5.4
Maryland	71,206	5,191	7.3
Massachusetts	12,298	317	2.6
Michigan	94,713	2,116	2.2
Minnesota	33,185	2,191	6.6
Mississippi (B)	37,145	2,870	7.7
Missouri	27,024	3,560	13.2
Montana (B)	12,654	1,598	12.6
Nebraska	8,565	397	4.6
Nevada (B)	43,612	7,494	17.2
New Hampshire	22,088	1,465	6.6
New Jersey	2,273	709	31.2
New Mexico (B)	21,330	3,285	15.4
New York	35,687	599	1.7
North Carolina (B)	133,213	6,181	4.6
North Dakota (B)	4,028	185	4.6
Ohio (B)	75,531	2,493	3.3
Oklahoma (B)	49,404	5,427	11.0
Oregon	104,811	8,834	8.4
Pennsylvania (B)	146,489	10,862	7.4
Puerto Rico (B)	10,794	654	6.1
Rhode Island (B)	11,462	840	7.3
South Carolina (B)	83,565	3,914	4.7
South Dakota (B)	3,567	350	9.8
Tennessee*	30,083	2,606	8.7
Texas (B)	245,845	29,233	11.9
Utah*	25,442	3,447	13.5
Vermont (B)	4,892	335	6.8
Virginia	226,686	22,040	9.7
Washington (B)	139,058	15,156	10.9
West Virginia (B)	28,967	2,909	10.0
Wisconsin**	0	0	0.0
Wyoming (B)	11,028	1,195	10.8
Totals	**3,990,500**	**271,030**	**6.8**
Brady State Totals	**1,638,838**	**163,581**	**10.0**

Potential Brady denials based on historical data (estimating that 2.5% of the number of queries reveal conditions warranting denial) 1,638,838 x .025 = 40,971

† Tracks the number of first-level queries to the FBI's criminal history database, the Interstate Identification Index. Firearms transaction checks may include other firearms-related checks by law enforcement.

* Statistics available beginning of May 1994

** No statistics are available

*** Not applicable. Transactions in handguns are prohibited in the District of Columbia.

(B) Brady state

VI. CONCLUSION

ATF has collected empirical and anecdotal evidence of the Brady Law's impact during its first year of implementation. By all indications, Brady is achieving its intended results. First, Brady is keeping handguns out of the reach of the bad guys. ATF's focused survey indicates that more than 15,500 convicted felons, fugitives, persons under restraining order for alleged acts of domestic violence and others were unable to obtain handguns last year because of Brady. Nationwide, the aggregate number of prohibited persons denied handguns in Brady states may be as high as 41,000. Second, the bad guys who were denied access to handguns constituted a fraction of the overall number of people who purchased handguns during the same period. The overall volume of handgun sales has remained substantially the same both before and after Brady's implementation. The conclusion is simple. Brady is not disrupting sales of handguns to legitimate purchasers. To the criminal element, however, Brady is extremely disruptive.

Appendix

Sample Brady Form

Form Approved: OMB No. 1512-0520 (1/31/95)

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
STATEMENT OF INTENT TO OBTAIN A HANDGUN(S)

Prepare in duplicate. All entries must be in ink. Before completing, please see notices and instructions on the back of this form.

SECTION A - TO BE COMPLETED PERSONALLY BY THE TRANSFEREE (BUYER). THE BUYER MUST PRINT ITEMS 1, 2, 3, 4, AND 5 OF THIS SECTION.

1. TRANSFEREE'S (BUYER'S) NAME (Last, (*and maiden, if applicable*), first, middle)

2. DATE OF BIRTH (Month, day, year)

3. RESIDENCE ADDRESS (No., street, county, city, State, and ZIP code)

4. **OPTIONAL INFORMATION** - THE INFORMATION REQUESTED IN THIS ITEM (4) IS OPTIONAL BUT WILL HELP AVOID THE POSSIBILITY OF BEING MISIDENTIFIED AS A FELON OR OTHER PROHIBITED PERSON.

SOCIAL SECURITY NUMBER	HEIGHT	WEIGHT	SEX

PLACE OF BIRTH

5. STATEMENT OF TRANSFEREE (BUYER), EACH QUESTION MUST BE ANSWERED WITH "YES" OR "NO" CHECKED IN THE APPROPRIATE BOX FOR EACH QUESTION.

	YES	NO		YES	NO
a. Are you under indictment or information* in any court for a crime punishable by imprisonment for a term exceeding one year? *A formal accusation of a crime made by a prosecuting attorney, as distinguished from an indictment presented by a grand jury.			c. Are you a fugitive from justice?		
			d. Are you an unlawful user of, or addicted to, marijuana, or any depressant, stimulant, or narcotic drug, or any other controlled substance?		
b. Have you been convicted in any court of a crime punishable by imprisonment for a term exceeding one year? (Note: A "YES" answer is necessary if the judge could have given a sentence of more than one year. A "YES" answer is not required if you have been pardoned for the crime or the conviction has been expunged or set aside, or you have had your civil rights restored, and under the law where the conviction occurred, you are not prohibited from receiving or possessing any firearm.)			e. Have you ever been adjudicated mentally defective or have you ever been committed to a mental institution?		
			f. Have you been discharged from the Armed Forces under dishonorable conditions?		
			g. Are you illegally in the United States?		
			h. Are you a person who, having been a citizen of the United States, has renounced his/her citizenship?		

I hereby certify that the answers to the above are true and correct. I understand that a person who answers "Yes" to any of the above questions is prohibited from purchasing and/or possessing a firearm, except as otherwise provided by Federal law. I also understand that the making of any false oral or written statement or the exhibiting of any false or misrepresented identification with respect to this transaction is a crime punishable as a felony.

TRANSFEREE'S (BUYER'S) SIGNATURE | DATE

SECTION B - TO BE COMPLETED BY THE TRANSFEROR (SELLER) (SEE NOTICES AND INSTRUCTIONS ON REVERSE.)

6. TRADE/CORPORATE NAME, ADDRESS, AND TELEPHONE NUMBER OF TRANSFEROR (SELLER) | FEDERAL FIREARMS LICENSE NUMBER

7. THE TRANSFEREE (BUYER) HAS IDENTIFIED HIMSELF/HERSELF TO ME BY USING A DRIVER'S LICENSE OR OTHER IDENTIFICATION THAT CONTAINS THE TRANSFEREE'S (BUYER'S) NAME, DATE OF BIRTH, RESIDENCE ADDRESS AND PHOTOGRAPH.

TYPE OF IDENTIFICATION
☐ DRIVER'S LICENSE ☐ OTHER (Specify) ____________________

NUMBER ON IDENTIFICATION

8. CONTENTS OF THE STATEMENT IN SECTION A OF THIS FORM WERE RECEIVED BY
____________________ OF ____________________ ON ____________________ BY
(Chief Law Enforcement Officer) (Law Enforcement Agency) (Date)
(Check the appropriate answer.)
☐ TELEPHONE ☐ TELEFAX ☐ IN PERSON ☐ OTHER (Specify) ____________________

9. A COPY OF THE STATEMENT IN SECTION A OF THIS FORM WAS TRANSMITTED TO THE CHIEF LAW ENFORCEMENT OFFICER ON
____________________ BY
(Date) (Check the appropriate answer.)
☐ MAIL ☐ TELEFAX ☐ IN PERSON ☐ OTHER (Specify) ____________________

10. ON ____________________, THE CHIEF LAW ENFORCEMENT OFFICER PROVIDED REASON TO BELIEVE THAT THIS TRANSFER
(Date)
☐ WOULD ☐ WOULD NOT VIOLATE FEDERAL, STATE, OR LOCAL LAWS. AGENCY IDENTIFIER ____________________

11. TRANSFEROR'S (SELLER'S) SIGNATURE | TRANSFEROR'S TITLE | DATE

U.S. Department of Justice

Office of the Associate Attorney General

Washington, D.C. 20530

ERIK REID
OFFICE OF THE ASSOCIATE ATTORNEY GENERAL
(202) 514-5995 (OFFICE)
(202) 307-3904 (FAX)

DATE: 1/23

TO: Dennis Burke

FAX #: 456-7028 PHONE #: ____________

OF PAGES: 14 (INCLUDING COVER)

COMMENTS: Attached is the executive summary of the GAO report. Also, DOJ and Treasury will put out a joint press release on Thursday to put the best spin on the story.

Talking Points
-> Prepared by Treasury

The Brady Law

The Brady Law continues to prevent crimes in this country. It is keeping handguns out of the reach of criminals, without infringing on the rights of legitimate and law-abiding handgun owners. Since the Brady law went into effect, nearly 45,000 convicted felons who have walked into gun stores and tried to buy handguns have been stopped by the simple means of a local Brady check. Nearly 20,000 others -- fugitives, kids, illegal drug users, and those under indictment, with mental disabilities, or under restraining order for alleged stalking -- have also been stopped from taking advantage of lawful gun sellers, and have been denied the right to buy a handgun. Doubtless many more criminals have been discouraged from even trying to buy a handgun.

Let me give you one example of who the law is stopping. Last October, the DeKalb County, Georgia police department reported to ATF that a possible convicted felon was trying to buy a handgun. It turned out that he was a convicted murderer. He had bought 8 handguns before the Brady Law went into effect. ATF arrested him and he will be sentenced in March for unlawful firearms possession.

This law is working. It is stopping crimes. And it must not be repealed.

United States General Accounting Office

GAO Draft Report

to the Congress

December 1995

GUN CONTROL

Implementation of the Brady Handgun Violence Prevention Act

Notice:
This draft is restricted to official use.

This draft report is being provided to obtain advance review and comment from those with responsibility for the subjects it discusses. It has not been fully reviewed within GAO and is, therefore, subject to revision

Recipients of this draft must not, under any circumstances, show or release its contents for purposes other than official review and comment. It must be safeguarded to prevent publication or other improper disclosure of the information it contains. This draft and all copies of it remain the property of, and must be returned on demand to the General Accounting Office.

Comptroller General
of the United States

Washington, D.C. 20548

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B-

The President of the Senate and the
Speaker of the House of Representatives

This report presents an evaluation of the implementation of phase I of the Brady Handgun Violence Prevention Act (P.L. 103-159), which went into effect February 28, 1994. During phase I, the Brady Act requires a 5-day waiting period for handgu purchases to allow law enforcement officers time to conduct presale background checks for evidence of felony convictions or other disqualifying information.

This report is part of our continuing efforts to provide Congress with information on the effectiveness of violence prevention legislation. It focuses on the number o: and reasons for handgun purchase denials in selected jurisdictions. In addition, th report addresses the extent of federal agency follow-up enforcement action regarding convicted felons and others who falsify their status on handgun purchase application forms. Finally, the report also discusses effects of court cases challenging the constitutionality of the act.

The Departments of Justice and the Treasury provided written comments on a draf of this report. Their views have been incorporated where appropriate.

We are sending copies of this report to appropriate congressional committees; the Secretary of the Treasury, the Attorney General; the Director of the Bureau of Alcohol, Tobacco and Firearms; and other interested parties. Copies will also be made available to others upon request.

This report was prepared under the direction of Norman J. Rabkin, Director, Administration of Justice Issues, who may be reached at (202) 512-8777 if you or your staff have any questions. Other major contributors are listed in appendix IV.

Charles A. Bowsher
Comptroller General
of the United States

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EXECUTIVE SUMMARY

PURPOSE

Since 1968, convicted felons, illegal drug users, and fugitives from justice have been barred by federal law from purchasing guns from federally licensed firearms dealers.[1] Even so, until Congress enacted the Brady Handgun Violence Prevention Act, there were no national procedures for dealers to verify whether any of their customers were ineligible purchasers.[2] Beginning February 28, 1994, Brady imposed a 5-day waiting period to allow state or local law enforcement officers time to conduct presale background checks on purchasers of handguns. The checks are to determine, on the basis of criminal history and other available records, if the prospective purchasers are prohibited by federal, state, or local laws from buying handguns.

In reviewing the first full year of Brady implementation, GAO's objectives were to determine (1) how frequently the 5-day waiting period and background checks were resulting in denying criminals and other ineligible individuals the opportunity to purchase

[1]Under the Gun Control Act of 1968, other ineligible purchasers include anyone adjudicated a "mental defective" or committed to a mental institution, dishonorably discharged veterans of the Armed Forces, persons who have renounced their U.S. citizenship, and aliens illegally or unlawfully in the United States. In this report, we will refer to these aliens as "illegal aliens."

[2]The act is named for former White House press secretary James Brady, who was permanently disabled by a gunshot wound sustained during an attempted assassination of President Reagan.

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handguns from federally licensed dealers; (2) the extent to which such denials have resulted in follow-up enforcement actions (e.g., arrests and prosecutions) against convicted felons and other ineligible purchasers who falsely complete the handgun purchase application form; and (3) the implications of the various legal challenges to Brady.

BACKGROUND

Enacted after several years of extensive public debate, Brady continues to be controversial. Opponents of gun control note that criminals can easily circumvent the law by purchasing handguns on the secondary market or by having friends or spouses without a criminal record make the purchases from dealers. Proponents acknowledge that criminal records checks alone will not prevent felons from obtaining firearms but say the checks could reduce dealer sales to disqualified persons and complement other crime control measures, such as stiffer mandatory sentences for firearms offenses.

26 states

At the time of GAO's review, Brady's provisions were applicable to 26 states ("Brady states"). The other 24 states screen handgun purchasers through a permit system or other procedures that, according to the Bureau of Alcohol, Tobacco and Firearms (ATF), meet or exceed Brady's requirements. ATF, within the Department of

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the Treasury, licenses gun dealers and is responsible for overseeing their compliance with Brady.[3]

Generally, the law enforcement community has strongly supported Brady, as evidenced by public endorsements from the International Association of Chiefs of Police and other organizations. Nonetheless, some sheriffs have filed federal lawsuits essentially contending, among other things, that the background check provision of Brady is beyond the scope of Congress' Commerce Clause powers and, therefore, is inconsistent with the Tenth Amendment. Eight of the nine court cases are separate filings by individual sheriffs--each having jurisdictional responsibility for one county or parish in his respective state--whereas the ninth and most recent case was filed by the Wyoming Sheriff's Association. By December 1994, federal district courts had ruled in favor of the respective sheriff in five of the six cases decided. All six cases were appealed to U.S. circuit courts. In September 1995, the U.S. Court of Appeals for the Ninth Circuit reversed two of the federal district courts' decisions, saying the federal government can require state and local law enforcement agencies to check records of prospective handgun buyers. As of October 1995, the four remaining federal district court cases were still under appeal.

[3]According to ATF data, there was a total of about 92,000 federal firearms licenses held by gun dealers in the 26 Brady states, as of March 31, 1995.

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Brady does not impose any reporting requirements on gun dealers or law enforcement officials. In fact, there are various statutory provisions that restrict the use of firearms-related information and prohibit the establishment of systems to register firearms, firearms owners, or firearms transactions. Thus, except for estimates, no comprehensive or national data on handgun purchase applications and denials are available. As reported by the Treasury Department, limited surveys by ATF found denial rates of 4.7 percent (The Brady Law: The First 100 Days) and 3.5 percent (One-Year Progress Report: Brady Handgun Violence Prevention Act) in selected jurisdictions.

RESULTS IN BRIEF

The legislative history of Brady gives no indication of what policymakers expected or considered to be a reasonable denial rate. In the 20 judgmentally selected jurisdictions (7 statewide and 13 local) GAO surveyed, it found that the law enforcement agencies designated to conduct background checks of prospective handgun purchasers cumulatively denied 19,740 (4.3 percent) of the 457,020 applications processed during the first year of Brady's implementation. In 15 of the jurisdictions with more detailed records, GAO found that the denial rate varied from jurisdiction to jurisdiction, in part, because law enforcement officials did not use common or standard criteria in making denials. For instance, regarding criminal history disqualifiers, some jurisdictions made

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denials only if the records showed a felony conviction or pending indictment, but other jurisdictions also denied on the basis of outstanding misdemeanor warrants, including warrants for unpaid traffic tickets. Also, in three jurisdictions in Texas, application forms being sent to wrong law enforcement agencies was a primary factor causing denial rates of 14.5, 18.5, and 26.8 percent.

Only 4 of the 15 jurisdictions had sufficiently detailed records to permit GAO to quantify denials based on violent crimes. GAO found that denials of applicants who had been convicted of or indicted for aggravated assault, murder, rape, or robbery totalled 371 and represented 0.2 percent of the applications and 4.9 percent of the denials in these 4 jurisdictions.

With limited exceptions, law enforcement officers in the 15 jurisdictions told GAO they relied solely on criminal history records in conducting background checks because no databases were available for searching the other prohibited categories, such as illegal aliens and dishonorably discharged veterans. The exceptions involve four jurisdictions in which law enforcement officials also routinely checked for mental history disqualification by using records from local courts and/or from state- or county-operated mental health facilities.

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Due to the way cases are coded in the Department of Justice's databases, the number of Brady-related prosecutions was not readily quantifiable. Available information indicated, however, that the number of prosecutions was relatively small and that such follow-up enforcement action was not a priority of Justice or U.S. Attorneys. On the other hand, Justice and ATF officials emphasized that the primary goal of Brady is being achieved; that is, felons are being prevented from buying handguns from federally licensed gun dealers.

The full effects of the court challenges to Brady will not be known until all appeals are decided. In the meantime, indications are that background checks are still being conducted in seven of the nine jurisdictions involved in the lawsuits, while no checks have been conducted at all in the other two jurisdictions. The Justice Department has determined that it lacks authority to impose penalties or otherwise prosecute chief law enforcement officers who choose not to conduct background checks. Moreover, Brady provides neither Justice nor Treasury the authority to redesignate chief law enforcement officers in situations where the initially designated officers do not perform the background checks.

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GAO'S ANALYSIS

Brady Results: Handgun Purchase Denials and Follow-up Enforcement Actions

In analyzing denial statistics and reasons in 15 jurisdictions, GAO found that almost half (48.7 percent) of the denials were because the prospective handgun purchasers had felony or misdemeanor criminal histories, 4.1 percent were based on other Brady ineligible categories, 0.8 percent involved restraining orders, 7.6 percent involved traffic offenses, and the remaining 38.9 percent were based on administrative or other reasons.

Of the denials based on criminal histories, the vast majority (91.8 percent) were for felony-related reasons. ~~Although some differences~~ existed among the jurisdictions regarding the course of action taken in response to records showing a felony arrest but not showing a disposition. The other denials in the criminal history category involved prospective handgun purchasers with outstanding misdemeanor warrants. Law enforcement officials in the respective jurisdictions told GAO that any individual with an outstanding misdemeanor warrant is considered to be a fugitive from justice.

Given the absence of pertinent databases, denials based upon the other Brady ineligible categories were relatively few. GAO found that most of these denials resulted coincidentally from searches of

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criminal history records. For example, in some instances, the records showed arrests or convictions for violations of immigration laws or absences without leave from the military.

Among the 15 jurisdictions, 2 cities in Texas (Fort Worth and Houston) accounted for all denials (1,413 total) specifically identified as involving unpaid parking tickets or other traffic offenses. However, four other jurisdictions also made denials based on outstanding misdemeanor warrants, of which an indeterminable number were for traffic offenses.

With 38.9 percent of the total denials in the 15 jurisdictions, administrative or other reasons represented the second highest category of denials. Within this category, 97.2 percent of the denials were due to gun dealers transmitting handgun purchase application forms to the wrong law enforcement agency. All of the denials involving missent forms were made by three jurisdictions in Texas--the cities of Fort Worth and Houston and Harris County. Denials based on missent forms represented 61.0 percent of the total denials within these three jurisdictions. This volume largely explains why Fort Worth, Houston, and Harris County had the highest overall denial rates--14.5, 18.5, and 26.8 percent, respectively--among the 15 jurisdictions GAO analyzed.

On the basis of queries to the agency's field offices, ATF headquarters staff told GAO that as of July 1995, a total of at

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least seven persons (nationally) had been successfully prosecuted for making false statements on the Brady handgun purchase form. Three of the cases involved individuals who lied about drug-related convictions. The subsequent prosecutions of these individuals resulted in prison or custody sentences of 12 to 24 months. The other four cases (related gun-trafficking cases) involved individuals who had falsified state identification cards and the Brady handgun purchase form to portray themselves as residents of West Virginia when, in fact, they resided in New York. All four defendants pled guilty. Three defendants were sentenced to 2 years probation, and the fourth was sentenced to 6 months home confinement and 3 years probation.

Effects of Court Challenges to Brady

In five of the six cases decided as of July 1995, the federal district courts have held Brady's background check provision to be unconstitutional as a violation of the Tenth Amendment. However, the courts left intact the 5-day waiting period and other core elements of Brady. In the sixth case, the court held that the Brady background check provision was consistent with the Tenth Amendment. In September 1995, the U.S. Court of Appeals for the Ninth Circuit reversed two of the rulings of unconstitutionality. The appeals court held that the federal government can impose the minimal burden of requiring state and local agencies to check the records of prospective handgun buyers.

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Despite the federal district court rulings, indications were that background checks were still being conducted in seven of the nine jurisdictions in which lawsuits had been filed. On the other hand, even though Brady has been in effect since February 28, 1994, indications were that no background checks on handgun purchasers had been conducted in the other two jurisdictions--Iberia Parish, Louisiana, and Ravalli County, Montana.

RECOMMENDATIONS

GAO is making no recommendations in this report.

AGENCY COMMENTS

Brady Act Supreme Court Oral Argument Talking Points

- Walter Dellinger, Acting Solicitor General, today defended the constitutionality of the Brady Act against a challenge by two sheriffs in Arizona and Montana.
    - The Brady Act provides that the Attorney General -- in response to the national epidemic of gun violence -- to establish a national instant criminal background check system (insta-check) by November 30, 1998.
    - Once that system is in place, firearms dealers will be required to contact it to determine whether a proposed sale of a handgun is lawful.
    - Until the insta-check system is in place, the Brady Act requires firearms dealers to contact their chief local law enforcement officer and, in essence, wait five days for the officer to make "a reasonable effort" to determine whether the proposed sale is lawful.
- The two sheriffs challenged the interim Brady Act requirement that they must make "a reasonable effort" to determine whether the sale of a firearm in their county is lawful by consulting "available" records..
- General Dellinger, on behalf of the United States, argued strongly that the interim and minimal duties of local law enforcement officers are consistent with constitutional principles of federalism.
    - The duties imposed are temporary, limited, non-policymaking tasks to give effect to a federal scheme.
    - Local law enforcement officers are uniquely suited to assist in the prevention of illegal sales of firearms until the creation of the insta-check system.
    - Any other approach at this time would have involved greater federal bureaucratic intrusion in local law enforcement offices.
- The five-day waiting period imposed on firearms dealers is not at risk in this case.
    - The Solicitor General argued that even if the Court found that Congress could not require local law enforcement officers to assist in the Brady Act, firearms dealers would still be subject to the five-day waiting period.
    - The vast majority of local law enforcement officers support the Brady Act and would voluntarily comply, even if not obligated to do so.

Department of Justice

FOR IMMEDIATE RELEASE
TUESDAY, FEBRUARY 25, 1997

BJS
202/633-3047

ABOUT 6,600 ATTEMPTS TO BUY GUNS THWARTED BY BACKGROUND CHECKS EACH MONTH SINCE BRADY LAW ENACTED

186,000 Blocked from March 1994 through June 1996

WASHINGTON, D.C. -- During the first 28 months of the Brady Act's effectiveness (March 1994 through last June) more than 186,000 illegal over-the-counter gun sales were blocked by background checks, the Justice Department's Bureau of Justice Statistics (BJS) announced today. Of the average 6,600 attempts stopped each month, more than 70 percent were rejected because they were indicted or convicted as felons. The data refer only to attempted purchases from licensed firearms dealers and do not indicate whether rejected purchasers later obtained a gun.

Based on BJS statistics covering specifically January 1996 through June 1996, gun dealers made more than 1.3 million inquiries about the potential eligibility of potential handgun buyers. The data contained specific reasons for rejections. Approximately 34,000, or 2.6 percent, were rejècted for the following reasons in percentages:

(MORE)

Convicted or indicted felon	72%
Fugitive	6
State law prohibition	4
Restraining order	2
Mental illness or disability	1
Other*	15

*Includes people addicted to illegal drugs, juveniles, aliens, violators of local ordinances, etc.

As of mid-year 1996, 14 states reported that their presale investigations included checking for outstanding restraining orders, and 11 states looked into mental heath records. The report noted that not all states check the categories of mental disability, restraining orders or drug abuse. In states that do check for these conditions, rejection rates are higher for these circumstances.

The surveys were of 600 law enforcement agencies, of which 176 from 44 states responded. Using standard statistical techniques, the totals were adjusted to account for the non-responding states. BJS is continuing its efforts to obtain a more complete response rate.

The Brady Handgun Violence Prevention Act (the Brady Act) provides that presale inquiries will be made permanent through

(MORE)

the National Instant Criminal Background Check System (NICS), which will be administered by the Federal Bureau of Investigation. It is to be established by November 1998, when the waiting period of the current system will be eliminated.

When the Brady Act took effect in February 1994, there were an average 3,100 monthly gun application rejections in the 32 states that the act required to follow its presale review procedures. From March 1994 through last June 30 there were 86,000 rejections of about 4.2 million applications or inquiries.

Federal law prohibits firearm sales to a person who--

- is under indictment for a crime punishable by imprisonment for more than one year or has been convicted of such a crime,
- is a fugitive from justice,
- is an unlawful user of a controlled substance,
- has been adjudicated as mentally defective or has been committed to a mental institution,
- was dishonorably discharged from the armed forces,
- has renounced United States citizenship,
- is subject to a court order restraining him or her from harassing, stalking or threatening an intimate partner or a child, or
- is a person who has been convicted of domestic violence.

The bulletin, "Presale Firearm Checks" (NCJ-162787), was written by Don Manson, of BJS, and Gene Lauver, of the Regional Justice Information Service. The statistics were obtained from the Treasury Department's Bureau of Alcohol, Tobacco and Firearms (March 1, 1994 through December 31, 1995) and from a BJS survey (January 1, 1996 through June 30, 1996).

The report is available on the Internet on BJS's Internet home page by clicking on "What's new at BJS." The BJS webpage address is:

http://www.ojp.usdoj.gov/bjs/

# # #

BJS97004
After hours contact: Stu Smith at 301/983-9354

U.S. Department of Justice
Office of Justice Programs

Bureau of Justice Statistics
Bulletin

February 1997, NCJ 162787

A National Estimate

Presale Firearm Checks

By Don Manson
Bureau of Justice Statistics
Gene Lauver
Regional Justice Information Service

On average each month an estimated 6,600 firearm purchases were prevented by background checks of potential gun buyers during the 28 months after the effective date of the Brady Handgun Violence Prevention Act. The checks revealed purchasers' ineligibility under Federal or State laws to buy a handgun or other firearm. Over 70% of the rejected purchasers were convicted or indicted felons.

Between March 1994 and June 1996, for all States together, there were almost 9 million applications to purchase firearms and an estimated 186,000 rejections. The data do not indicate whether rejected purchasers later obtained a firearm through other means.

Highlights

Presale firearms checks: Estimates of inquiries and rejections

	Bureau of Alcohol, Tobacco and Firearms[a]				Bureau of Justice Statistics[b]	
	3/1/94-12/31/94		1/1/95-12/31/95		1/1/96-6/30/96	
	All States	Original Brady States[c]	All States	Original Brady States[c]	All States	Original Brady States[c]
Inquiries and rejections						
Inquiries/applications	3,679,000	1,696,000	4,009,000	1,884,000	1,308,000	570,000
Rejected	92,000	42,000	60,000	28,000	34,000	16,000
Rejection rate	2.5%	2.5%	1.5%	1.5%	2.6%	2.8%
Reasons for rejection						
Felony indictment / conviction	65,000	30,000	43,000	20,000	24,000	13,000
Other	26,000	12,000	17,000	8,000	9,000	3,000

Note: All estimated counts are rounded. Percentages were calculated from unrounded data. Detail may not add to total because of rounding.
[a]Information was provided by the Bureau of Alcohol, Tobacco and Firearms. The estimates include all types of guns.
[b]Based on 176 sources in 44 States. The estimates reflect only applications for purchase of handguns.
[c]Original Brady States are the 32 States required to follow presale review procedures set out in the Brady Act when it became effective on February 28, 1994. (See the table on page 3.)

- Presale background checks of persons applying to buy a handgun or long gun resulted in about 6,600 rejections each month. This estimate, covering the period between March 1, 1994, and June 30, 1996, includes both States operating under the Brady Handgun Violence Prevention Act (Brady States) and States with comparable statutes preventing gun sales to prohibited persons (Brady-alternative States).

- More than 7 in 10 of the rejections occurred when potential buyers were found to have had a felony conviction or to be under felony indictment.

On average each month, an estimated 3,100 applications were rejected in the 32 States that followed the review procedures set forth in the Brady Act when it became effective in February 1994 ("original Brady States"). During the period from March 1994 through June 1996, there were 86,000 rejections from a total of about 4.2 million applications or inquiries.

These are the first BJS statistics from an ongoing survey to assess the impact of presale checks on preventing sales of handguns and long guns to persons in prohibited categories. The categories are defined in the Federal Gun Control Act of 1968 or related State legislation. (See *Background* on this page.)

In the most recent 6 months for which national data were collected, January to June 1996, gun dealers made more than 1.3 million inquiries about the eligibility of potential buyers of handguns. About 34,000 ineligible customers were identified, a rejection rate of 2.6%. For the original Brady States during the most recent period, 570,000 inquiries or applications resulted in 16,000 rejections. This represented a 2.8% rejection rate.

During the first half of 1996, almost three-fourths of rejections of a handgun purchase were based on a finding of a felony conviction or indictment. Although not all States have the capability to check nonfelon categories, fugitives from justice (6%), persons who violated State laws (4%), and persons under court restraining or protective orders (2%) accounted for the next largest categories of rejections.

Rejected applications, (all States) 1/1/96-6/30/96	100%
Felon (convicted/indicted)	72
Fugitive	6
State law prohibition	4
Restraining order	2
Mental illness or disability	1
Other*	15

*Includes persons addicted to illegal drugs, juveniles, aliens, violators of local ordinances, those who have renounced citizenship, persons dishonorably discharged, and unspecified.

As of midyear 1996, 14 States reported that presale checks included a check of outstanding restraining orders; 11 States reported that checks of mental health records are made in connection with presale firearm checks.

When only those States that reported searching data bases for reasons other than felony status are considered, rejections for such reasons accounted for the following:

Nonfelony reason	Percent of rejections in States which search records for specific nonfelony reasons
Fugitive	6%
Restraining orders	4
Mental illness	2

Sources of data

The findings are based on data collected by the Bureau of Alcohol, Tobacco and Firearms (ATF) and BJS. Data for 1994 and 1995, provided by ATF, were calculated using the number of firearm-coded inquiries to the FBI's criminal history database. The percentage of denials used for ATF estimates was based on the experiences of jurisdictions that had implemented presale firearms check procedures prior to the Brady Act.

Data for the first half of 1996 were collected under the BJS Firearm Inquiry Statistics (FIST) program. The results were from a survey of 600 law enforcement agencies, of which 176 in 44 States responded.

Background

The provisions of the Federal Gun Control Act (18 U.S.C. §§ 922 (g) and (n) as amended) prohibit the sale of firearms to an individual who —

- is under indictment for, or has been convicted of, a crime punishable by imprisonment for more than 1 year;
- is a fugitive from justice;
- is an unlawful user of a controlled substance;
- has been adjudicated as a mental defective or committed to a mental institution;
- is an alien unlawfully in the United States;
- was discharged from the armed forces under dishonorable conditions;
- has renounced U.S. citizenship;
- is subject to a court order restraining him or her from harassing, stalking, or threatening an intimate partner or child; or
- is a person convicted of domestic violence.

Brady Act

The Brady Act was enacted in November 1993 and became effective in February 1994.* The interim provisions of the act require that licensed firearm dealers request a presale check on all potential *handgun* purchasers from the Chief Law Enforcement Officer (CLEO) in the jurisdiction where the prospective purchaser resides.

The CLEO must make a reasonable effort to determine if the purchaser is prohibited from receiving or possessing a handgun. The Federal firearms licensee must wait 5 business days before transferring the handgun to the buyer unless earlier approval is received from the CLEO. These interim procedures will terminate no later than November 30, 1998.

The "interim provision" also permits States to follow a variety of alternatives to the 5-day waiting period. These alternatives include States that issue firearm permits, perform "instant checks," or conduct "point-of-sale" checks. To qualify under these alternatives, State law must require that before any licensee completes the transfer of a handgun to a nonlicensee, a government official verify that possession of a handgun by the transferee would not be a violation of law. Example of Brady-alternative States include California ("point-of-sale check"), Virginia ("instant check"), and Missouri (permit).

After November 1998 instant background checks will be required for

*Data collection began after the effective date of the Brady Handgun Violence Prevention Act (P.L. 103-159) on February 28, 1994.

purchasers of all firearms. The background check will determine, based on available records, if an individual is prohibited under the Federal Gun Control Act or State law from receiving or possessing firearms.

Under the "permanent provisions" of the Brady Act, presale inquiries will be made through the National Instant Criminal Background Check System (NICS). The act requires the NICS, which will be operated by the FBI, to be established no later than November 1998. At that time the procedures related to the waiting period of the interim system will be eliminated.

Under the FBI's proposed NICS configuration, State criminal history records will be provided through each State's central repository and the Interstate Identification Index. The index, maintained by the FBI, points instantly to criminal records that States hold. In addition, the FBI will provide records of Federal offenses, Federally maintained State data, and Federal data on nonfelony disqualifications. States responding to NICS inquiries for nonfelony prohibitions will provide their records directly.

The National Criminal History Improvement Program (NCHIP)

To ensure immediate availability of complete and accurate State records, the Brady Act established a grant program authorized at $200 million. The program is to assist States to develop criminal history record systems and improve the interface with the NICS.

A major goal of the grant program is the interstate availability of complete State records when the NICS is implemented. Toward this goal, over $112 million was awarded in direct awards to States during fiscal years 1995 and 1996. NCHIP program funds have also supported direct technical assistance to States, evaluation, and related research.

Gun purchaser background checks, by State, 1996

State	Brady State (Y) Original (3/1/94)	Brady State (Y) 6/30/96	Number of law enforcement contacts responsible for record checks*	State data bases being accessed: Criminal histories	Wanted fugitives	Re-straining orders	Mental health
Alabama	Y	Y	67	Y	Y		
Alaska	Y	Y	35	Y	Y		
Arizona	Y	Y	1	Y	Y		
Arkansas	Y	Y	1	Y	Y		
California			1	Y	Y	Y	Y
Colorado	Y		1	Y	Y	Y	
Connecticut			1	Y		Y	
Delaware			1	Y	Y		Y
Florida			1	Y	Y	Y	
Georgia	Y		1	Y	Y		Y
Hawaii			4	Y	Y		Y
Idaho	Y		1	Y	Y	Y	
Illinois			1	Y	Y		Y
Indiana			1	Y			
Iowa			99	Y	Y	Y	Y
Kansas	Y	Y	123	Y			
Kentucky	Y	Y	1	Y	Y	Y	
Louisiana	Y		59	Y			
Maine	Y	Y	128	Y	Y		
Maryland			1	Y	Y		
Massachusetts			270	Y	Y		Y
Michigan			625	Y	Y		
Minnesota	Y		568	Y	Y		Y
Mississippi	Y	Y	263				
Missouri			115	Y	Y		
Montana	Y	Y	59	Y	Y		
Nebraska			95	Y	Y		
Nevada	Y	Y	1	Y	Y		
New Hampshire	Y		1	Y	Y	Y	
New Jersey			490	Y	Y	Y	Y
New Mexico	Y	Y	112	Y			
New York			58	Y	Y		
North Carolina	Y		98	Y	Y		
North Dakota	Y	Y	53	Y	Y		
Ohio	Y	Y	1	Y	Y		
Oklahoma	Y	Y	440	Y			
Oregon			208	Y	Y		Y
Pennsylvania	Y	Y	67	Y			
Rhode Island	Y	Y	39	Y	Y		
South Carolina	Y	Y	1	Y	Y		
South Dakota	Y	Y	66	Y	Y	Y	
Tennessee	Y		96	Y		Y	
Texas	Y	Y	991	Y	Y		
Utah	Y		1	Y	Y		
Vermont	Y	Y	22	Y	Y	Y	
Virginia			1	Y	Y	Y	
Washington	Y		291	Y	Y		
West Virginia	Y	Y	1	Y	Y	Y	
Wisconsin			1	Y	Y		Y
Wyoming	Y	Y	40	Y	Y		
Total	32	22	5,602	49	41	14	11

*In the Brady States contacts are the chief law enforcement officers (CLEO's); in Brady-alternative States these contacts are identified according to criteria of each State.
Source: *Survey of State Procedures Related to Firearm Sales*,BJS, May 1996 (NCJ-160763).

Firearm Inquiry Statistics program

The FIST program was established under the NCHIP to develop data on the impact of presale firearm checks on the identification of prohibited firearm purchasers. None of the FIST information provided from agencies to BJS contains or reveals the identity of individual applicants.

Information requested for the survey does not include data traceable to an applicant, and the computer program that some agencies use to collect FIST data transmits only the appropriately aggregated or categorized responses. The computer program also assists agencies in purging records after the delay times specified in law.

An initial report describing State background check procedures, *Survey of State Procedures Related to Firearm Sales* (NCJ-160763), was released in May 1996. Data summarizing the number of inquiries, rejections, and reasons for rejections are collected regularly and will be summarized and released semiannually.

Applicable State legislation

When the Brady Act became effective on February 28, 1994, 32 States and Puerto Rico were required to follow presale review procedures set out in the act. The remaining States were Brady-alternative States. Since then, 10 more States have enacted legislation to become Brady-alternative States (Colorado, March 1994; Georgia, January 1996; Idaho, June 1994, Louisiana, May 1996; Minnesota, August 1994; New Hampshire, January 1995; North Carolina, December 1995; Tennessee, May 1994; Utah, March 1994; and Washington, June 1996).

Methodology

The following presents the approach used to derive the 6-month estimate (for the period January to June 1996) from a sample of law enforcement offices charged with determining eligibility to purchase a firearm.

Data collection

For those States with local chief law enforcement officers (local CLEO's), CLEO's were randomly selected within each of the population size categories, based upon 1990 Census data: categories A (under 10,000 residents), B (10,000 to 100,000), C (over 100,000). The sample was also stratified between Brady States and Brady-alternative States.

A total of 176 CLEO's submitted data in time for this survey: 63 in category A, 55 in B, 36 in C, and 22 statewide CLEO's. Some agencies carried out presale determinations for other agencies or had determinations done for them by other agencies. The populations accorded these agencies were adjusted, based on the number of residents they actually served.

Calculation of estimates

(1) Census data for 1990 were used to calculate relative weights of samples from local and State CLEO's. The estimated 1990 population for the 50 States was 248,102,973.

(2) At least some data were received from 44 States. The general procedure to estimate all 50 States was —

(a) For each size category the populations for those agencies that submitted data and for all agencies of that size were totaled. A factor was computed from these two numbers.

(b) The raw number of applications and rejections (in sum and for each rejection category) were totaled for each size group.

(c) For the estimated number of applications and estimated number of rejections, the totals were multiplied by the factor computed in (a) for each size group.

(d) The totals for all size groups were added together to get the totals for the numbers of applications and rejections.

(e) To get the estimated number in each reason-for-rejection category, the percentage of the total raw rejections was calculated, and that percentage was multiplied by the estimated total number of rejections.

(3) New Jersey submitted data for total applications and rejections, but no reasons for rejections or breakdowns for its local CLEO's. Data for local CLEO's in New Jersey were ignored. Alaska submitted data for most of that State's CLEO's. This study categorized both States as State reporting agencies.

(4) Of the three States that changed from Brady to Brady-alternative States after 1995, Georgia (1/1/96) was considered a Brady-alternative State, and Louisiana (5/7/96) and Washington (6/6/96), Brady States.

(5) Two large cities were analyzed separately because of their high rejection rates; their averages were not used to estimate the overall rejection rates. Their numbers of rejections were included in the final total, however.

(6) Agencies for the following States reported data for applications and rejections but no data for reasons for rejection: Alaska, Indiana, New Hampshire, New Jersey, Ohio, and West Virginia.

(7) To evaluate properly the application and rejection rates for purchasing populations within a given area, the appropriate CLEO was identified.

(a) If cities within a participating county CLEO were acting as their own CLEO's, their populations were subtracted from the county population.

(b) If a municipal CLEO was discovered to be providing services for other selected municipalities, then populations for those municipalities were added to the population of the city having the CLEO.

(c) Those CLEO's selected to participate in the study but found to be relying on other jurisdictions to conduct background checks were replaced by those other jurisdictions (for example, a town being replaced by a county).

(8) Maine has local CLEO's; however, Maine's data came from the State police that serve 40% of the State's population. The State police data were split into A and B categories based on the proportion of the Maine population in each category.

(9) Connecticut did not submit any data in time for this study. Connecticut has both local and State CLEO's, but for the purposes of this study, Connecticut was classified as a State CLEO.

(10) National estimates exclude the District of Columbia and U.S. territories. Sales of firearms are prohibited in the District of Columbia except to law enforcement officers.

The Bureau of Justice Statistics is the statistical agency of the U.S. Department of Justice. Jan M. Chaiken, Ph.D., is director.

BJS Bulletins present the first release of findings from permanent data collection programs. Don Manson, BJS Program Manager, and Gene Lauver, manager of the Firearm Inquiry Statistics program, Regional Justice Information Service (REJIS), wrote this Bulletin under the supervision of Carol Kaplan, Chief, National Criminal History Improvement Programs, BJS. REJIS of St. Louis, MO, collected and analyzed the FIST data presented. The Bureau of Alcohol Tobacco and Firearms assisted with background and analysis. Darrell Gilliard provided statistical verification. Tom Hester produced and edited the report. Marilyn Marbrook, assisted by Yvonne Boston and Jayne Pugh, administered final report production.

Further information about the Firearm Inquiry Statistics (FIST) program may be obtained from Carol Kaplan, BJS, or Gene Lauver, REJIS, 4255 West Pine Blvd., St. Louis, MO. 63108.

February 1997, NCJ-162787

This report and others from the Bureau of Justice Statistics are available through the Internet —

http://www.ojp.usdoj.gov/bjs/

① Every Major law enf. organization endorsed Brady

② Great Anecdotes on Brady arrests.

THE WALL STREET JOURNAL TUESDAY, SEPTEMBER 17, 1996

→ State prosecutions in anecdotes

Clinton's Gun Hoax

By JAMES BOVARD

President Clinton is making the Brady Handgun Violence Prevention Act a centerpiece of his re-election campaign. He's mentioned the Brady Act, which requires a five-day waiting period and police background check for handgun purchasers, over 300 times in speeches and interviews since he took office. But as with many of the president's policies, the reality doesn't live up to the hype.

He said it before the Convention Speech

In his Aug. 29 acceptance speech at the Democratic Convention, Mr. Clinton proclaimed that "we stopped 60,000 felons, fugitives and stalkers from getting handguns under the Brady bill." Seven days later, speaking to supporters in Michigan City, Ind., Mr. Clinton upped the ante, proclaiming, "We did pass the Brady Bill and 100,000 felons, fugitives and stalkers lost their handguns."

100,000 figure was from a ~~Brady~~ Sarah Brady study released on that Monday

White House Deputy Press Secretary Mary Ellen Glynn explained away the 100,000 figure by stating that the president "misspoke" and noting that "he was reaching the end of a train trip." However, both the 60,000 and 100,000 figures are political hoaxes. The Brady Act may have resulted in denying 60,000 people permission to buy a handgun at a specific store. But to claim that those people were thereby prevented from getting a gun makes as much sense as deducing the number of homeless by how many people have ever been turned down for a mortgage loan—regardless of whether they subsequently got another loan or had other lodging.

Black Market Guns

Few criminals bother filling out federal forms when they acquire weapons. A recent national survey of police chiefs found that 85% believed that the Brady Act has not prevented any criminal from obtaining a handgun from illegal sources in their jurisdiction. According to a 1991 Justice Department survey of convicts, most guns used to commit crimes have been acquired illegally or on the black market.

Arenberg Survey (he is hated by all law enforcement)

The only way that Mr. Clinton could confidently assert that 60,000 to 100,000 "felons, fugitives and stalkers" didn't get guns is if his administration had prosecuted all of them and locked them up. (It is a federal crime, carrying a prison sentence of up to 10 years, for a convicted felon to purchase a handgun.) However, federal prosecutors in the first 15 months of the new law locked away only three people. (Four others were convicted but not incarcerated.) A General Accounting Office report noted, "None of the prosecutions involved prospective gun purchasers with previous convictions for violent offenses."

A national survey of police chiefs found that 85% believed that the Brady Act has not prevented any criminal from obtaining a handgun from illegal sources.

The lack of prosecutions is especially surprising, since would-be handgun buyers must supply their address in filling out the application. Thus, federal agents need merely drive to the person's residence and slap on the handcuffs. The Justice Department, responding to GAO criticism about the lack of prosecutions, noted that "prosecutions for false statements on handgun purchase applications are inefficient and ineffective." A high-ranking Justice Department official also justified the lack of prosecutions because "no new resources were provided to U.S. Attorney Offices, which already must make resource allocation decisions to address competing demands."

While the federal government may not have the resources to enforce the Brady Act, the law does dump a huge administrative load on local police agencies. Dennis Martin, president of the National Association of Chiefs of Police, estimated in late 1993 that enforcement of the Brady Act would require at least 10 million hours a year of law enforcement employees' time. "Ironically," Mr. Martin noted, "we may expect an increase in crime as understaffed, overworked law enforcement agencies throughout the nation spend millions of hours away from patrols and crime-solving to engage in background checks not funded by the Brady bill."

→ rogue organization

Nor is there any credibility to Mr. Clinton's claim that all the 60,000 or 100,000 blocked purchasers were "felons, fugitives and stalkers." A January GAO survey found that in the first 15 months of the law's enforcement, 38% of would-be gun buyers had their applications rejected for administrative reasons (primarily paperwork snafus), 7.6% were rejected because of traffic violations, 2% because of minor drug violations, 0.3% because of a dishonorable discharge from the armed forces (primarily for being AWOL), and 0.8% because they were illegal aliens.

Only 44.7% were denied as a result of felony convictions, arrests, warrants or indictments. (Another 1% were denied because they were classified as "fugitives from justice.") GAO found that the vast majority of people who were denied handgun purchases did not have a history of violence. In Fort Worth, Texas, only 2.3% of those denied handgun purchases were violent felons; in Harris County (Houston), Texas, 3.4%. The highest figure that GAO found was in Ohio, where 15.3% of the denied applicants had violent felonies on their records.

Even the 44.7% felony number is inflated. GAO noted that the denials reported by the Bureau of Alcohol, Tobacco and Firearms last year "do not reflect the fact that some of the initially denied applications were subsequently approved, following administrative or other appeal procedures."

In many instances law enforcement officials are overly zealous in denying handgun purchases. Some of the jurisdictions GAO surveyed (including Arkansas and Nevada) routinely denied handgun purchase applications based on records showing a felony arrest, even when no evidence was found of a conviction. Also, some jurisdictions are denying the right to buy a handgun to any person who has ever had been arrested for "minor drug offenses," regardless of whether he was convicted. Thus, someone caught with a single marijuana cigarette at age 19 may be prohibited from ever owning a handgun for his family's self-defense.

→ This is still good

A Charade

The Clinton administration itself has made it obvious that the Brady Act is a public relations charade. When the constitutionality of the act was challenged in 1994, the administration responded in a court brief that a local Arizona sheriff need only make a "reasonable" effort to conduct a background check—and stated that, if the sheriff's department was too busy at that time, "a 'reasonable' effort may be no effort at all." Apparently, as long as political bragging rights are safe, it doesn't much matter to the Clinton Justice Department whether the law is actually enforced.

he lost re-election

But the act may not even be on the books much longer. Four of the five federal district judges who have examined challenges to the Brady Act have ruled it a violation of the 10th Amendment, though a federal appeals court upheld it. The Supreme Court will hear a challenge to the act this fall, and the law may be dead and buried before the next presidential inauguration. In the meanwhile, Mr. Clinton will continue to wring maximum political value from the law.

The Brady Act epitomizes the mindset of focusing obsessively on guns as the root of all evil, while letting violent felons skip merrily along even after they have committed a new crime. "It is an irony that Clinton is using the Brady Act as a focus of fighting against crime," says Gerald Arenberg, executive director of the National Association of Chiefs of Police. "You talk to the 650,000 guys in uniform, and they know it is a joke."

→ he has been sued by a few states for fraud

Mr. Bovard is the author of "Lost Rights: The Destruction of American Liberty" (St. Martin's Press, 1994).

What Americans Really Think of School Choice

By Jeanne Allen

Two recent education polls have made national news, both claiming wide support for public education as we know it and overwhelming opposition to choice programs that would allow parents to send their children to private schools. But both polls were deeply flawed, probably by design. In fact, it may not be an exaggeration to say that the polls lied, in an attempt to ward off popular ideas that threaten the livelihoods of a failing system's defenders.

"The Public Still Believes in Public Schools," declares a press release from Phi Delta Kappa, a professional educators' association that since 1968 has commissioned an annual Gallup poll on attitudes toward public schools. Each year the survey gives high marks to local schools and finds strong opposition to school choice—although support for choice has risen from 24% in 1993 to 36% this year. (It's also worth mentioning that Phi Delta Kappa changed the wording of its question in 1993. Before then, a more explanatory and objective question annually yielded about 45% in favor of a "voucher system.")

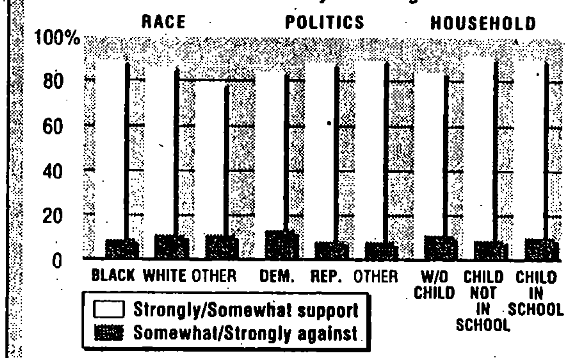
The other survey, conducted by GOP pollster Linda DiVall for the National Education Association (the nation's largest teachers' union) came up with similar findings. According to the NEA poll, school choice is opposed even by 69% of *Republicans*, allowing the union to claim its views have the overwhelming support of both parties.

These results seemed suspicious to us. They conflicted with a bevy of state-based polls (in Arizona, Connecticut, Minnesota, Wisconsin and elsewhere) that have found overwhelming support for school choice. Wondering whether Phi Delta Kappa and the NEA were simply asking biased questions, we decided to conduct our own poll.

We hired a reputable independent polling firm, International Communications Research, to ask nine questions about school choice and the public's perceptions of public schools. We crafted our questions to ensure that they were unbiased and informative enough to make clear what we were asking.

For School Choice

How much do you support providing the option of sending children to the school of their choice rather than to the school to which they are assigned?



Source: Center for Education Reform/Int'l Communications Research

Our findings differed sharply from those of the union and its allies. Of those surveyed in the Center for Education Reform/ICR poll, 86% said they favor permitting parents to send their children to the public, private or parochial school of their choice. Seventy-two percent believe that state legislators should assist children in failing schools to opt out of that school and attend a school—public, private or parochial—of the parents' choosing. And 73% favor allowing poor children government-funded scholarships to attend any school. On this last question, support was stronger among blacks (90%) than whites (71%), and among Democrats (77%) than Republicans (67%).

Why were our results so different from those of Phi Delta Kappa and the NEA? Because they designed questions likely to elicit negative responses, using such loaded phrasing as "at public expense" or "with public tax dollars." The NEA even went so far as to ask if school choice is preferable to helping public schools—as if the two were mutually exclusive.

Now, one can easily object that our group is biased too, since we favor school choice. You decide. Here are questions from the three polls:

Phi Delta Kappa/Gallup: Do you favor or oppose allowing students and parents to choose a private school to attend at public expense?

NEA: Do you think that tax dollars should be used to assist parents who send their children to private, parochial or religious schools, or should tax dollars be spent to improve public schools?

Center for Education Reform/ICR: How much do you support providing parents with the option of sending their children to the school of their choice—either public, private or parochial—rather than only to the school to which they are assigned?

As dishonest as the tendentious polls is the NEA's claim that voters have defeated school choice 21 times at the ballot box. In truth, school-choice ballot initiatives have only been defeated three times—and for reasons having more to do with politics and money than with genuine public opposition to the principle of choice. Women's suffrage took far more attempts than that before it finally won over the public. As for the other initiatives the NEA cites, they were efforts to subsidize private or religious schooling directly—something few choice proponents believe in.

The NEA's claim that school choice means less money for public schools may fool the public for a while. For just as much as we all want things to change, we also want to protect America's long-established tradition of public schooling. The good news is that school choice doesn't threaten public education. On the contrary, the challenge of competition may be just the spur to improvement the educational Establishment needs.

Public education was never intended to be an institution owned and controlled by government alone. Local control has historically been the hallmark of educational excellence. Americans know it, and they want the freedom to educate their children in whatever manner they see fit.

Furthermore, contrary to Gallup's results, both our poll and the more comprehensive Public Agenda survey released earlier this year found widespread dissatisfaction with the quality of public education. With that reality in mind, it's no wonder the unions and their special-interest allies have to skew their polls. If they dared to ask honest questions, they'd be forced to admit they've long outlived their usefulness.

Ms. Allen is president of the Center for Education Reform.

THE WALL STREET JOURNAL
TUESDAY, SEPTEMBER 17, 1996

104TH CONGRESS
2D SESSION

S. 1654

To apply equal standards to certain foreign made and domestically produced handguns.

IN THE SENATE OF THE UNITED STATES

MARCH 28, 1996

Mrs. BOXER (for herself and Mr. BRADLEY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To apply equal standards to certain foreign made and domestically produced handguns.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Junk Gun Violence Protection Act".

SEC. 2. FINDINGS.

The Congress finds that—

(1) the prohibition on the importation of handguns that are not generally recognized as particularly suitable for or readily adaptable to sporting

purposes, often described as junk guns or Saturday night specials, has led to the creation of a high-volume market for these weapons that are domestically manufactured;

(2) traffic in junk guns constitutes a serious threat to public welfare and to law enforcement officers, and the use of such firearms is increasing;

(3) junk guns are used disproportionately in the commission of crimes;

(4) of the firearms traced in 1995, the 3 firearms most commonly traced to crimes were junk guns; and

(5) the domestic manufacture, transfer, and possession of junk guns should be restricted.

SEC. 3. RESTRICTION ON MANUFACTURE, TRANSFER, AND POSSESSION OF CERTAIN HANDGUNS.

(a) RESTRICTION.—Section 922 of title 18, United States Code, is amended by adding at the end the following new subsection:

"(y)(1) It shall be unlawful for a person to manufacture, transfer, or possess a junk gun that has been shipped or transported in interstate or foreign commerce.

"(2) Paragraph (1) shall not apply to—

"(A) the possession or transfer of any junk gun otherwise lawfully possessed under Federal law on the date of the enactment of the Junk Gun Violence Protection Act;

"(B) any firearm or replica of a firearm that has been rendered permanently inoperative;

"(C) the manufacture for, transfer to, or possession by the United States or a State or a department or agency of the United States, or a State or a department, agency, or political subdivision of a State, or a transfer to or possession by a law enforcement officer employed by such an entity for law enforcement purposes (whether on or off duty); or

"(D) the manufacture, transfer, or possession of a junk gun by a licensed manufacturer or licensed importer for the purposes of testing or experimentation authorized by the Secretary.".

(b) DEFINITION OF JUNK GUN.—Section 921(a) of title 18, United States Code, is amended by adding at the end the following new paragraph:

"(33)(A) The term 'junk gun' means any firearm that is not described in section 925(d)(3), and any regulations issued under such section.".

○

Date: Friday, June 14, 1996 4:42 pm
From: SS01(MARCUS)
Subject: Draft Brady brief

Attached is our draft brief in the 10th Cir. Brady Act case. The brief must be sent out next Wednesday (6/19). As you might expect, this brief won't be too different from the briefs we filed in other Brady Act cases, so hopefully it won't take long to review. If you have any comments, I'd appreciate it if you could let me know by noon on Tuesday. If I don't hear from you by then, I'll just assume you don't have comments. Thanks for your help. --Stephanie

P.S. I realize most of the cites to New York in the draft haven't been changed to U.S. reports -- we'll make sure to fix those before the brief is filed.

cc: Mark Stern

DRAFT 6/14

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 95-2269

SHERIFF JOHN LEE,

Plaintiff/Appellant,

v.

UNITED STATES OF AMERICA

Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BRIEF FOR APPELLEE

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Plaintiff's Complaint invoked the district court's jurisdiction under the Commerce Clause and the Fifth, Tenth and Thirteenth Amendments to the Constitution. Appendix ("App.") 1 at ¶ IV.[1] On November 1, 1995, the United States District Court for the District of New Mexico entered final judgment in favor of the United States, the defendant in this matter. App. 33.

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[1] The appellant's appendix is not paginated. Thus, if a document appears in the appendix, it will be cited as follows: App. (District court docket #) at (page or paragraph # within document). If the document is not in the appendix, it will be cited as follows: R. (district court docket #) at (page # within document). If the document appears in the Supplemental Appendix filed with this brief, the citation will be to the relevant page number therein: Supp. App. at (page #).

Plaintiff filed a timely notice of appeal on November 29, 1995. R. 34. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Interim provisions of the Brady Handgun Violence Prevention Act establish a five-day waiting period for the purchase of a handgun. The interim provisions also require Chief Law Enforcement Officers ("CLEOs") such as plaintiff to make a "reasonable effort" to determine if there is a legal impediment to proposed handgun sales. The issues presented for review are:

1. Whether interim provisions of the Brady Handgun Violence Prevention Act that require limited involvement by CLEOs in implementing federal law contravene the Tenth Amendment.

2. Whether plaintiff, a CLEO, presents a justiciable vagueness challenge to the Brady Act's criminal penalty provision, which, as the Department of Justice has formally concluded, does not apply to the conduct of such officials.

3. Whether, assuming this Court accepts any part of plaintiff's constitutional argument, the remaining provisions of the Brady Act are severable.

STATEMENT OF THE CASE

A. Nature of the Case.

Sheriff John Lee brought this action to challenge the constitutionality of the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) ("Brady Act") (codified at 18 U.S.C. § 921 et seq.). Sheriff Lee contended that the Act's interim requirements, including the requirement that he make a "reasonable effort" to ascertain if there is a legal impediment to a handgun sale, violate the Tenth Amendment. Plaintiff also claimed that the Act is unconstitutionally vague because it imposes criminal penalties on local officials who fail to undertake such a "reasonable effort."

The district court rejected plaintiff's arguments and upheld the constitutionality of the Brady Act in its entirety. The court thus dismissed plaintiff's case. This appeal followed.

B. Statutory Background.[2]

1. The Gun Control Act of 1968, 18 U.S.C. § 921 et seq., establishes a comprehensive federal regulatory scheme governing the manufacture and distribution of firearms in interstate commerce. The Gun Control Act prohibits the sale or transfer of firearms to specified classes of persons, including those who have been under indictment for or convicted of serious crimes.

Congress enacted the Brady Act to enhance enforcement of these prohibitions on gun transfers. See H.R. Rep. No. 344, 103d Cong., 1st Sess. 7-8 (1993). The Brady Act amends the Gun Control Act to require the federal government to establish a national instant criminal background check system by November 30, 1998. 18 U.S.C. § 922 Note. Firearms dealers will then be required to refer the proposed firearm transfer to that system to determine whether any legal impediment exists to the sale. 18 U.S.C. § 922(t)(1).

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[2] Relevant statutory provisions are attached as an addendum to this brief.

2. Congress also enacted interim provisions to deal with the national "epidemic of gun violence"[3] pending creation of the permanent system. H.R. Rep. No. 344 at 8. This interim scheme does not apply in the 26 states and two territories that have their own background check or permit requirements. 18 U.S.C. § 922(s)(1)(C)-(D).

The interim provisions require that a prospective gun purchaser provide a firearms dealer with identifying information, including the purchaser's name, address, and date of birth. 18 U.S.C. § 922(s)(3)(A)-(B). The dealer then must pass on the content of the statement to the jurisdiction's CLEO, an official defined in 18 U.S.C. § 922(s)(8) as "the chief of police, the sheriff, or an equivalent officer or the designee of any such individual." See id. § 922(s)(1)(A)(i)(III)-(IV).

In tandem with this information disclosure requirement, the Brady Act establishes a five-day waiting period before the purchaser may receive the gun. Id. § 922(s)(1)(A)(ii)(I). It also provides that, during that time, the CLEO "shall make a reasonable effort" to determine whether a legal impediment exists to the proposed sale:

> A chief law enforcement officer to whom a transferor has provided notice * * * shall make a reasonable effort to ascertain within 5 business days whether receipt or possession

[3] Congress observed that 12,489 Americans were murdered with handguns in 1992; gun murders increased by 41% between 1988 and 1992; 530,000 Americans were robbed or assaulted by gun-wielding criminals in 1991; armed rapists attacked nearly 15,000 women in 1992; and firearms injuries cost our economy $19 billion dollars annually. H.R. Rep. No. 344 at 8.

> [of the handgun] would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.

Id. § 922(s)(2).[4]

The Bureau of Alcohol, Tobacco and Firearms ("ATF"), which is charged with interpretation and implementation of the Gun Control Act (see 18 U.S.C. § 926; 37 Fed. Reg. 11696-97 (1972)), issued guidance to CLEOs through a January 21, 1994 open letter. ATF Letter, R. 10, Exh. 1; Supp. App. at --. ATF explained that, since CLEOs themselves are in the "best position to determine" what constitutes a "reasonable effort," "[e]ach * * * CLEO will have to set its own standards based on its own circumstances, i.e., the availability of resources, access to records, and taking into account the law enforcement priorities of the jurisdiction." Id. at 10; Supp. App. at --. ATF further explained that while the Act generally "anticipates some minimal effort to check commonly available records," CLEOs are not obliged to check "every conceivable record system that may contain information relating to categories of prohibited persons." Id. at 9; Supp. App. at --. Moreover, the ATF Letter makes clear that, since the "vast majority of [disqualified] persons * * * are prohibited by virtue of some criminal background," a CLEO's reasonable effort should normally focus on criminal history records. Id. Finally, ATF noted that, in some

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[4] If the CLEO finds no bar to a sale and voluntarily reports his findings to a firearms dealer, the sale may proceed before the expiration of the waiting period. Id. § 922(s)(1)(A)(ii)(II).

circumstances, such as when the CLEO has personal knowledge of a gun purchaser, a CLEO may legitimately decide that it is "reasonable" to do no research at all. Id. at 10; Supp. App. at --.

The Brady Act also imposes two other duties incident to the "reasonable effort" requirement. If the CLEO finds no impediment to the proposed handgun sale, the records related to the referral must be destroyed. 18 U.S.C. § 922(s)(6)(B)(i). If the CLEO determines that the sale is barred, the prospective purchaser may request that the CLEO provide written reasons for the determination within 20 business days. Id. § 922(s)(6)(C). The Act insulates CLEOs from damage claims for failing to prevent an unlawful handgun sale or for mistakenly concluding that a transfer would be contrary to law. Id. § 922(s)(7).

3. The criminal penalties section of the Brady Act, 18 U.S.C. § 924(a)(5), provides: "Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined not more than $1,000, imprisoned for not more than 1 year, or both." The Department of Justice, which has sole authority over federal criminal prosecutions, has formally stated through its Office of Legal Counsel that this provision does not apply to CLEOs. See R. 10, Exh. 2; Supp. App. --.

C. Statement of Facts and Course of Proceedings Below.

1. Plaintiff Lee is the Sheriff of Otero County, New Mexico and is that county's "chief law enforcement officer." Complaint, App. 1 at ¶¶ I, IX. He filed this action on October 6, 1994 in

the United States District Court for the District of New Mexico seeking declaratory and injunctive relief. Id. at ¶ III.

2. The district court (Hansen, J.) conducted an evidentiary hearing on July 14, 1995. At that hearing, Sheriff Lee explained how his office processes Brady Act referrals. He stated that his dispatchers -- six full-time employees as well as "some" part-time workers -- conduct the Brady Act background checks. Tr. 46. The dispatchers do a computer check, using the National Crime Information Center ("NCIC") data base.[5] Id. The dispatchers also check state and local records. Id.

3. On November 1, 1995, the district court issued its final judgment. App. 33. The court upheld the constitutionality of the Brady Act in all respects.

In rejecting plaintiff's Tenth Amendment claim, the court found persuasive the reasoning of the Ninth Circuit in Mack v. United States, 66 F.3d 1025 (9th Cir. 1995), petitions for cert. filed, Nos. 95-1478, 95-1503 (S. Ct.). See Slip op., App. 32 (hereinafter "Op.") at 13. Like the Ninth Circuit in Mack, the district court rejected the contention that New York v. United States, 505 U.S. 144 (1992), rendered the challenged Brady Act provisions unconstitutional. Id. at 11-14. The court found the statute at issue in New York to be clearly distinguishable:

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[5] NCIC is a computerized system operated by the Federal Bureau of Investigation that includes criminal history information collected from thousands of federal, state, and local law enforcement organizations. See 104 Stat. 4823 (1990); 28 C.F.R. § 20.31(a).

> Contrary to the position of Sheriff Lee, the CLEOs are not being directly commanded by the kind of federal mandate condemned by New York. They are not commanded to enact legislation or regulations, or to take other actions central to sovereign bodies. Instead, they are directed to temporarily serve in helping to carry out a federal program. They are not being asked to formulate a state policy, for which they would be subject to political accountability. Their activities are not different from their usual line of work and represent a minimal interference with state function.

Id. at 14. Accordingly, the court granted summary judgment to the government on plaintiff's Tenth Amendment claim. Id. at 18.

The court also dismissed plaintiff's Fifth Amendment claim as unripe. Id. It reasoned that Sheriff Lee faced no threat of imminent prosecution "given the language of the Act" and given that the Department of Justice has interpreted the Brady Act's criminal penalties provision (18 U.S.C. § 924(a)(5)) as inapplicable to a CLEO's enforcement duties. Id. at 7-8.

Because the district court rejected all of plaintiff's constitutional claims,[6] it did not address Sheriff Lee's argument that the challenged provisions were not severable from the remainder of the Brady Act.

SUMMARY OF ARGUMENT

1. The district court correctly upheld the Brady Act in its entirety. With respect to the Tenth Amendment claim, the court properly recognized that plaintiff's argument rests on a misreading of New York v. United States, and cannot be reconciled

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[6] Before the district court, plaintiff also challenged the Brady Act under the Thirteenth Amendment. The court rejected this claim (Op. 16-18), and plaintiff does not raise it on appeal.

with the history of the Tenth Amendment and contemporary Supreme Court jurisprudence.

The Brady Act responds to a national epidemic of handgun violence by imposing federal regulations on firearms dealers. The Act mandates establishment of an instant background check system by late 1998 and requires firearms dealers to refer proposed sales to that system. As an interim measure, the Act requires dealers to refer the proposed sales to CLEOs. The CLEOs are then required to make a "reasonable effort" to determine if the sale is barred by law.

The interim provisions challenged here do not alter the fundamentally federal character of the approach devised by Congress and do not contravene the Tenth Amendment. CLEOs are given broad discretion to determine the scope of their "reasonable effort" in light of their own resources and law enforcement priorities. Further, ATF has determined that it is generally "reasonable" for CLEOs to choose to fulfill their duties merely by consulting readily accessible criminal records. Thus, in light of his limited resources and competing obligations, plaintiff can -- and does -- meet his obligations simply by having his dispatchers perform checks of criminal records to the extent possible given the circumstances. The requirement that CLEOs destroy the records pertaining to the proposed sale is even more obviously minimal, as is the requirement that a CLEO explain, on request, why the sale is barred by law.

Congress's decision to require this type of limited assistance in executing a federal law governing private parties is well within the scope of its constitutional authority. The Framers contemplated that the national government would make use of state officers to carry out some federal laws regulating private parties, and a variety of statutes have imposed such duties from the time of the earliest Congresses to the present day.

The Supreme Court's jurisprudence reflects this settled principle. The Court has never held that Congress is completely barred from placing requirements on state officials. Indeed, in FERC v. Mississippi, 456 U.S. 742 (1982), the Court upheld a federal statute that, like the Brady Act, required state authorities to implement federal policy by applying it, in the course of carrying out their regular responsibilities, to private parties regulated by law.

New York v. United States, 505 U.S. 144 (1992) did not purport to overrule prior decisions and well-established Tenth Amendment principles. The statute at issue in that case was fundamentally different from those in this case, FERC, and other decisions upholding federal mandates on state officials. In New York, unlike the present case, Congress identified a national problem -- the disposal of radioactive waste -- but did not respond by enacting a federal solution. Instead, Congress required either that the individual states legislate their own solutions to the problem of radioactive waste, or that they take title to the waste, incur substantial penalties, and then -- as in the first alternative -- devise a system for its proper disposition. The Court held that this statute was unconstitutional because both alternatives "'commandeer[ed] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" Id. at 2428 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)) (emphasis added).

The teaching of New York is clear: Congress may not identify a national problem, then require the states to devise solutions. Such directives require states to make law, not simply to execute a federal program governing private parties. They thus intrude on fundamental attributes of state sovereignty and undermine the principles of political accountability protected by the Tenth Amendment. By the same token, New York did not signal a departure from the well-established tenet that the federal government may require reasonable state help in implementing federal law. In upholding the Brady Act, both the Second and Ninth Circuits have understood this to be the teaching of New York. Frank v. United States, 78 F.3d 815 (2nd Cir. 1996); Mack v. United States, 66 F.3d 1025 (9th Cir. 1995), petitions for cert. filed, Nos. 95-1478, 95-1503 (S. Ct.). But see Koog v. United States, 79 F.3d 452 (5th Cir. 1996).

As the Frank and Mack Courts recognized, the defects that were fatal to the statute in New York have no counterpart in the Brady Act. Congress addressed the problem of handgun violence by imposing federal restraints on firearms dealers. The Brady Act does not require the states to legislate or to create their own regulatory regimes. Its interim requirement that CLEOs provide minimal assistance to implement the federal scheme, which affords the CLEOs great discretion in the exercise of their statutory responsibilities, is consistent with constitutional tradition and the Supreme Court's jurisprudence up to and including New York.

2. The district court also properly held that plaintiff's Fifth Amendment challenge to the Brady Act's criminal penalties provision was nonjusticiable. Plaintiff has conjured up a constitutional controversy where none exists and thus has failed to state a justiciable claim. As the district court and the Second and Ninth Circuits have noted, the Department of Justice has officially announced that the criminal penalties section does not apply to local officials. Since the Department has sole authority over criminal enforcement, plaintiff faces no realistic prospect of prosecution.

Moreover, the district court correctly concluded that the statutory penalties are inapplicable to CLEOs. Supreme Court precedent teaches that a federal statute should not be construed to impose burdens on state officials unless Congress's intent to do so is unmistakably clear. That test is not met here. The criminal penalties section applies not to officials who help implement the Act, but rather to the handgun dealers and purchasers whom the statute regulates in its effort to prevent illegal handgun transactions.

3. Even if this Court were to reverse the district court and hold that the "reasonable effort" requirement violates the Tenth Amendment, that provision is severable from the remainder of the Act. It is axiomatic that a court must refrain from invalidating more of a statute than absolutely necessary. And, especially where, as here, Congress has expressed its intent by including a severability clause in the text of the statute, the provisions should be severed unless there is strong evidence that Congress would not have enacted the remaining sections.

As every court to address this issue has concluded, there is no such evidence here. Congress plainly believed that the statute as enacted was best calculated to stem the tide of handgun violence. However, it is also clear that the statute is operational and furthers congressional purposes even if the mandatory "reasonable effort" requirement is severed from the Act. Even without such a requirement, local officials would be informed of pending handgun transfers, and those officials who wish to conduct background checks could do so. Moreover, where no check is conducted, sales would be subject to the five-day "cooling off" period that many members of Congress saw as a key benefit of the Act.

ARGUMENT

I. THE BRADY ACT'S REQUIREMENT THAT LOCAL OFFICIALS UNDERTAKE REASONABLE EFFORTS TO DETERMINE THE LEGALITY OF PROPOSED HANDGUN TRANSFERS IS FULLY CONSISTENT WITH THE TENTH AMENDMENT.

A. Standard Of Review And Reviewability.

This Court reviews constitutional questions de novo. See United States v. Bolton, 68 F.3d 396, 398 (10th Cir. 1995). This issue was raised below in Plaintiff's Complaint (App. 1 at ¶ IV), and in the Memorandum In Support Of Defendants' Motion For Partial Dismissal And For Summary Judgment (R. 10 at 14-31).

B. The Tenth Amendment Does Not Bar Federal Requirements That State Administrative Officials Provide Limited Assistance In Implementing Federal Law.

The Brady Act establishes federal restrictions on the sale of handguns. Pending the creation of a national instant criminal background check system, the Act requires limited, interim assistance by CLEOs in implementing the federal scheme. Congress's authority to require this assistance is firmly supported by precedent and constitutional tradition. The Supreme Court has upheld statutory structures that, like the Brady Act, require state officials to apply federal law to private parties in the course of their regular duties. Moreover, the Framers themselves understood that the federal government could lawfully employ state officers to implement federal law, and, from our nation's founding to the present day, Congress has passed statutes requiring just that kind of state assistance. Finally, as both the Second and Ninth Circuits have held, the conclusion that Congress may require state officials to assist in the implementation of statutes like the Brady Act is fully consistent with the Supreme Court's ruling in New York v. United States, 112 S. Ct. 2408 (1992). Frank, 78 F.3d at 827-30; Mack, 66 F.3d at 1028-32. But see Koog, 79 F.3d at 458-62.

1. The Supreme Court Has Recognized That The Federal Government May Require Limited State Assistance In Implementing Federal Law.

The Supreme Court has emphasized that, under our constitutional plan, restraints on federal power over the states "inhere[] principally in the workings of the National Government itself," and not in judicially enforceable "limitations on the objects of federal authority." Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985). Thus, the Court "has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers." Gregory v. Ashcroft, 501 U.S. 452, 464 (1991).

In keeping with this principle and with the supremacy of federal law, the Supreme Court has stressed that the federal government may require state assistance in implementing federal law. Where the federal government devises a legislative solution that regulates private conduct and merely calls upon state officers for limited, nonpolicymaking help in enforcing that law, no constitutional problem is presented.

A different situation exists where Congress chooses not to enact a federal solution and, instead, directs the states to devise or adopt their own regulatory schemes. Put differently, the constitutional line is crossed when Congress asks the states to make law, not simply to carry it out. As the Court held in New York, which we discuss in detail below, in that situation Congress blurs lines of political accountability and intrudes into the heart of state sovereignty.

This distinction is explicit in FERC v. Mississippi, 456 U.S. 742 (1982), where the Court observed that "[w]hile this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations, there are instances where the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions." Id. at 761-62 (emphasis added) (citing EPA v. Brown, 431 U.S. 99 (1977); Fry v. United States, 421 U.S. 542 (1975); Washington v. Washington State Commercial Passenger Fishing Ass'n, 443 U.S. 658 (1979); Testa v. Katt, 330 U.S. 386 (1947)). Thus, "the Federal Government has some power to enlist a branch of state government * * * to further federal ends." FERC, 456 U.S. at 762.

In so ruling, the FERC Court rejected the "19th-century view," expressed in Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861), that "Congress 'has no power to impose on a State officer, as such, any duty whatever.'" 456 U.S. at 761 (quoting Dennison, 24 How. at 107). This "rigid" understanding, the Court declared, "is not representative of the law today." 456 U.S. at 761; see also Puerto Rico v. Branstad, 483 U.S. 219, 230 (1987) (overruling Dennison); Frank, 78 F.3d at 825-26; Mack, 66 F.3d at 1029.

In accord with its understanding that Congress could require assistance from state officials in carrying out federal law, the FERC Court upheld a directive similar in key respects to the provisions at issue here. FERC involved a statutory requirement -- section 210 of the Public Utility Regulatory Policies Act -- that states "implement" FERC rules designed to encourage power production at small plants. 456 U.S. at 759. In practice, the statutory mandate meant that state executive branch officials were required to apply federal law to disputes involving private parties. Id. at 759-60. State executive branch officials were also required to submit annual reports to the federal government on their implementation of federal standards. Id. at 749.

The Court -- in a result concurred in by all nine Justices -- held that compelling state executive officers to undertake these duties was consistent with the "preeminent position held by federal law throughout the Nation." Id. at 761; see id. at 775-76 & n.1 (O'Connor, J., concurring in part and dissenting in part). In addition, the FERC Court majority held that the same statute's requirement that states "consider" enacting certain energy standards if they desired to continue regulating in this field was constitutional because it did not "threaten the States' 'separate and independent existence,' * * * [or] impair the ability of the States 'to function effectively in a federal system.'" Id. at 765-66 (citations omitted); cf. Koog, 79 F.3d at 459 n.10 (seeking to distinguish FERC, but failing to discuss the Court's ruling as to section 210).

FERC thus makes clear that the Tenth Amendment does not prevent the federal government from enlisting the help of state executive officials in applying federal law to private parties. Moreover, the FERC decision is plainly consistent with longstanding Tenth Amendment jurisprudence. As noted in FERC, the Supreme Court has upheld a variety of federal laws that impose requirements on states to engage in reasonable administrative action. See 456 U.S. at 762 (collecting cases); Frank, 78 F.3d at 826; Mack, 66 F.3d at 1029.

FERC and subsequent cases also make clear that no Tenth Amendment problem exists simply because a state must devote its "substantial effort[s]" to implementing a federal requirement. South Carolina v. Baker, 485 U.S. 505, 514-15 (1988).[7] As this Court has recognized, "[t]he Supreme Court has made clear that the mere fact that a federal statute requires a state to expend resources in compliance therewith, by itself, is not fatal for Tenth Amendment purposes." Ponca Tribe v. Oklahoma, 37 F.3d 1422, 1434-35 (10th Cir. 1994), judgment vacated on other grounds, 116 S. Ct. 1410 (1996).

Moreover, when the burden on a state is insignificant, constitutional concerns are likewise minimal. See Baker, 485 U.S. at 529 (Rehnquist, C.J., concurring in the judgment)

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7 FERC and Baker thus establish that federal mandates that effectively require the states to spend money do not, for that reason alone, violate the Tenth Amendment. See FERC, 456 U.S. at 770 n.33 (state's argument based on financial burdens was "unconvinc[ing]").

(concluding that requirements at issue had no "substantive effect" on significant state functions); Frank, 78 F.3d at 826, 830-31; Mack, 66 F.3d at 1032.[8] Similarly, constitutional concerns are diminished where the challenged provisions form part of an interim scheme. See Fry, 421 U.S. at 548 (emphasizing, in sustaining statute, that it was an emergency measure); National League of Cities v. Usery, 426 U.S. 833, 853 (1976) (stressing that Fry statute was only temporary enactment), overruled on other grounds, Garcia, 469 U.S. 528 (1985); see also Wayte v. United States, 470 U.S. 598, 613 (1985) (noting, in rejecting First Amendment challenge, that challenged scheme was the "only effective interim solution" to significant national problem).

2. Both the Framers And The First Congresses Understood That The National Government Could Require State Assistance In Implementing Federal Law.

The Supreme Court's contemporary understanding that no constitutional problem is raised by laws requiring state executive officials to take ministerial action to carry out federal law governing private parties is firmly rooted in constitutional tradition. Both proponents and opponents of the

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[8] In analogous areas, the Court has also repeatedly emphasized that minimal intrusions do not raise issues of constitutional magnitude. See Morrison v. Olson, 487 U.S. 654, 691 (1988) (upholding limitation on President's power to remove special prosecutor because it does not "unduly trammel[] on executive authority"); Helvering v. Gerhardt, 304 U.S. 405, 421 (1938) (to establish tax immunity, state must show that "the burden upon the state function is actual and substantial, not conjectural"); Department of Taxation & Finance of New York v. Milhelm Attea & Bros., Inc., 114 S. Ct. 2028, 2036 (1994) (general rule that state may not regulate Indian traders does not apply to state law that imposes "minimal burdens" on reservation retailers).

Constitution understood that, under our system of federalism, the federal government could lawfully call upon state officials to provide assistance in implementing national policy governing private parties. See Frank, 78 F.3d at 828 ("the Framers contemplated and approved the administration by state officials of federal laws applicable to individuals").

To be sure, the Framers did not want the federal government to be dependent on state legislation, because that dependence (which had been the experience under the Articles of Confederation), would uniquely require the federal government to "'attempt to coerce sovereign bodies, states, in their political capacity.'" New York, 112 S. Ct. at 2422 (quoting 2 J. Elliot, Debates on the Federal Constitution 197 (statement of O. Ellsworth)). They unambiguously believed, however, that state officials could be required simply to execute federal law and thought that such requirements served federalism well because they avoided the need for a large federal bureaucracy. See The Federalist, No. 45, at 312-13 (J. Cooke ed.).

Consistent with this understanding, in The Federalist, Alexander Hamilton recognized that Congress could "make use of the State officers and State regulations, for collecting" federal taxes. The Federalist, No. 36 at 227 (J. Cooke ed.); see also id. at 226 (in assessing and collecting taxes, "[t]he national Legislature can make use of the system of each State within that State") (emphasis in original); id., No. 27, at 174 (Hamilton) (the Constitution "will enable the government to employ the ordinary magistracy of each [state] in the execution of its laws") (emphasis added).[9] Similarly, James Madison stated that "it is extremely probable that in other instances, particularly in the organisation of the judicial power, the officers of the States will be cloathed with the correspondent authority of the Union." Id., No. 45 at 313; see also Samuel Beer, To Make A Nation: The Rediscovery of American Federalism 252 (1993) ("Madison himself expected the new federal government to govern through the state governments"). Similarly, Patrick Henry specifically anticipated that sheriffs would be required to assist in federal tax collection: "The sheriff comes to-day as a state collector. Next day he is federal." 3 Debates In The Several State Conventions On The Adoption Of The Federal Constitution 168 (J. Elliot ed. 1987).

Moreover, the earliest Congresses enacted statutes requiring local officials to participate in the implementation of federal laws.[10] The First Congress directed that the clerk of "any common law court of record, in any one of the states * * * shall

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[9] The term "magistracy" includes state executive officials. Black's Law Dictionary 951 (6th Ed. 1990) ("[i]n its widest sense [magistracy] includes the whole body of public functionaries * * * * [i]n a more restricted (and more usual) meaning, it denotes the class of officers who are charged with the application and execution of the laws"). See also The Federalist, No. 47 at 325-31 (Madison) (discussing role of "executive magistrate").

[10] Legislation enacted by these Congresses provides an important guide to understanding the Framers' constitutional plan. E.g., Myers v. United States, 272 U.S. 52, 175 (1926); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884); see also Mistretta v. United States, 488 U.S. 361, 398-401 (1989); Marsh v. Chambers, 463 U.S. 783, 786-92 (1983).

record" the application of a person seeking citizenship under federal naturalization laws. Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103 (1790).

Similarly, in 1798, the Fifth Congress required clerks of courts -- including state courts[11] -- who had received declarations of intent by aliens seeking to become citizens, "to certify and transmit * * * an abstract of such declaration" to the United States Secretary of State; the law provided that clerks would receive $2 for each abstract and would be penalized $10 for failing to comply. Act of June 18, 1798, ch. 54, § 2, 1 Stat. 567 (1798). And in 1802, the Seventh Congress directed court clerks to participate in the creation of a national registry of aliens and required the clerks to issue certificates to aliens seeking naturalization. Act of April 14, 1802, ch. 28, § 2, 2 Stat. 154-55 (1802).[12]

Nor are such statutes limited to the Framers' era. Of course, in accord with Garcia's insight that federalism is

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[11] Prior laws on naturalization made it clear that the clerks receiving such declarations included state court clerks. See Third Congress, Act of Jan. 29, 1795, ch. 20, § 1, 1 Stat. 414 (1795) (requires that alien declare "on oath or affirmation, before the supreme, superior, district or circuit court of some one of the states * * *" (emphasis added)). A subsequent law passed by the Seventh Congress also reflects this understanding. See Seventh Congress, Act of April 14, 1802, ch. 28, § 1, 2 Stat. 153 (1802) (alien "shall have declared on oath or affirmation, before the supreme, superior, district or circuit court of some one of the states * * * " (emphasis added)).

[12] These laws were not unique. See Act of Feb. 12, 1793, ch. 7, § 1 , 1 Stat. 302 (1793) (mandating that the "executive authority" of a state or territory take action to return fugitive slaves).

protected primarily through political safeguards, Congress does not routinely call for state officials' assistance. Nevertheless, many contemporary statutes do require participation by state and local officials in implementing federal regulatory schemes.[13] Under plaintiff's theory, however, these federal statutes -- including those requiring state officers to report missing children and traffic fatalities -- would be unconstitutional. See Mack, 66 F.3d at 1029-30.("[t]he obligation imposed on state officers by the Brady Act is no more remarkable than, say, the federally-imposed duties of state officers to report missing children * * * or traffic fatalities"). Such a view of the Tenth Amendment is inconsistent with both the Framers' understanding and Congress's actions from its earliest days to the present.

3. New York v. United States Is Wholly Consistent With The Principle That The Federal Government May Require State Assistance In Implementing Federal Law.

Contrary to plaintiff's arguments, the district court's opinion does not conflict with the Supreme Court's decision in

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[13] E.g., 42 U.S.C. § 5779(a) (requires state and local law enforcement agencies to report cases of missing children); 23 U.S.C. § 402(a) (requires states to implement highway safety programs and to report traffic fatalities); 42 U.S.C. §§ 11001, 11003 (requires comprehensive data collection and reporting, as well as the creation of state emergency response commissions, with respect to the release of hazardous substances); 15 U.S.C. § 2645 (requires governors to conduct certain reporting and approval activities with respect to local educational agencies); 20 U.S.C. § 4013 (requires governors to submit plans for asbestos abatement and follow certain reporting procedures); 42 U.S.C. § 6933 (requires states to inventory state hazardous waste sites); 42 U.S.C. § 6991(a) (requires governors to inventory underground storage tanks).

New York v. United States, 505 U.S. 144 (1992). The law at issue in New York presented states with two alternatives. A state could (1) provide for the disposal of all low-level radioactive waste generated within the state by 1996 or (2) take title to that waste at that time. See 112 S. Ct. at 2416-17. The first alternative, the Court emphasized, was a "command [to] state government to enact state regulation." Id. at 2429 (emphasis in original). The directive thus clashed with the constitutional rule that Congress itself must "legislate" where there is a sufficiently powerful federal interest and thus may not "conscript" states to legislate for it. Ibid.

The Court held that the second alternative -- that the states actually take title to the radioactive waste -- was also fatally flawed for the same reason. See id. at 2428; see also infra page xx (second alternative would ultimately require state to devise an administrative solution to federally identified problem). Indeed, the political accountability problem in New York was exacerbated by the fact that, as the Court stressed, the take title alternative was "no different than a congressionally compelled subsidy from state governments to radioactive waste producers," and thereby penalized the states to the benefit of the very parties who had produced the radioactive waste. Id. at 2428.

Accordingly, the Court's explicit holding in New York was that both statutory alternatives were unconstitutional because both "'commandeer[ed]'" the states' political processes "'by directly compelling them to enact and enforce a federal regulatory program.'" Id. at 2428 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)) (emphasis added); Kelley v. United States, 69 F.3d 1503, 1509 (10th Cir. 1995) (under New York, constitutional question is whether Congress has "somehow commandeer[ed] the legislative processes of the States") (internal quotations omitted); Frank, 78 F.3d at 828; Mack, 66 F.3d at 1030.

Throughout New York, the Court stressed the constitutional problems that arise when Congress declines to enact a federal legislative solution and instead commands that states "enact and enforce" their own schemes. See Frank, 78 F.3d at 828 (noting New York's "repeated reference to" this language from Hodel). This kind of buck-passing, the Court emphasized, violates the Framers' constitutional design because it allows federal officials to avoid responsibility for politically controversial decisions. "Accountability is * * * diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the view of the local electorate in matters not pre-empted by federal regulation." 112 S. Ct. at 2424. New York makes clear that the federal government may not diminish accountability in this way by "commandeering" the states' political processes, no matter how strong the federal interest or how much latitude states are given. Id. at 2428-29; accord Kelley, 69 F.3d at 1509. As the Ninth Circuit explained, under New York, "the federal government is not entitled to coerce the

States into legislating or regulating according to the dictates of the federal government." Mack, 66 F.3d at 1030.

Thus, New York reiterates the constitutional rule that Congress may not command the states to devise solutions -- to make policy -- for problems identified by federal authorities. Quintessentially, as New York makes clear, Congress may not require states to legislate.[14] The constitutional prohibition is not limited to requirements to legislate, however. Because the "power to make decisions and to set policy is what gives the State its sovereign nature" (FERC, 456 U.S. at 761), federal statutes mandating that state executive officials promulgate regulations or otherwise make policy at federal command also implicate the accountability concerns central to the Tenth Amendment. See id. ("the ability of a state legislative (or, as here, administrative) body -- which makes decisions and sets policy for a State as a whole -- to consider and promulgate regulations of its choosing must be central to a State's role in the federal system"). Consistent with this understanding, at the very end of the New York opinion, the Court noted that the "Federal Government may not compel the States to enact or administer a federal regulatory program." 112 S. Ct. at 2435 (emphasis added).

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[14] See also Thompson v. Oklahoma, 487 U.S. 815, 877 (1988) (Scalia, J., dissenting) (states' legislative processes are the "heart of their sovereignty"); In Re Duncan, 139 U.S. 449, 461 (1891) (key feature of a republican form of government is "right of the people to * * * pass their own laws in virtue of the legislative power reposed in representative bodies").

In fact, these accountability problems in administrative policymaking were present in New York. If a state declined to legislate and was required to take title to radioactive waste, it would have to resolve administratively the same policy issues that would have confronted the legislature. Thus, even if the state refused to legislate, it would be compelled by federal law to devise its own policy solutions and create its own legal mechanism to deal with a national problem. See Mack, 66 F.3d at 1031 (New York is "an instance where 'the etiquette of federalism has been violated by a formal command from the National Government to enact a certain policy'") (quoting United States v. Lopez, 115 S. Ct. 1624, 1642 (Kennedy, J., joined by O"Connor, J., concurring)); Frank, 78 F.3d at 827-28.

Thus, the Court's analysis in New York does not establish an absolute bar against any federal requirement that state officials implement national policy. Significantly, the Court neither disavowed its prior recognition that the federal government may "direct[] state decisionmakers to take or to refrain from taking certain actions" (FERC, 456 U.S. at 762), nor overruled previous decisions recognizing that various mandates to state officials pass constitutional muster. See Mack, 66 F.3d at 1030-31; Frank, 78 F.3d at 829-30. In fact, as in FERC, the Court reaffirmed that statutes may permissibly impose enforcement duties on state officials so long as those officials merely assist in "congressional regulation of individuals." 112 S. Ct. at 2430 (citing, inter alia, Testa v. Katt, 330 U.S. 386 (1947)). In contrast, the New York Court stated, a "congressional requirement[] that States regulate" is impermissible. Id.; see also id. at 2441 (White, J., concurring in part and dissenting in part) (noting that majority had indicated that it did not "intend to cut a wide swath through [the Court's] recent Tenth Amendment precedents"). The Fifth Circuit thus fundamentally erred in suggesting that, under New York, any additional duties placed on state officials or "coercion" of the states is impermissible. See Koog, 79 F.3d at 458-60. That understanding, which was the linchpin of the Fifth Circuit's decision finding the Brady Act unconstitutional, cannot be squared with New York itself, much less the other Supreme Court decisions we have discussed.

Indeed, if the New York Court had intended to erect an absolute bar to directing state officials to take any actions, its searching analysis of the problems presented by the statute at issue would have been superfluous. After announcing the new rule that plaintiff purports to find in New York -- and overruling its prior, directly conflicting cases -- the Court could have disposed of the case in a terse paragraph.

In sum, New York makes clear that Congress may not require the states to develop legislative or administrative solutions to federal problems. Equally, New York casts no shadow on the well-established principle that the states may be called upon to assist in the implementation of federal law governing private parties. As we demonstrate below, because the Brady Act represents a federal response to a national problem and requires only limited assistance by CLEOs in its implementation, the statute passes scrutiny under the Supreme Court's jurisprudence up to and including New York.

B. The Brady Act Is Constitutional As A Congressional Response To A National Problem That Requires Only Limited Assistance From Chief Law Enforcement Officers.

As the foregoing discussion makes clear, the "Brady Act is not the kind of federal mandate condemned by New York." Mack, 66 F.3d at 1031. As noted, the law invalidated in New York was a "command [to] state government to enact state regulation" to deal with the problems of radioactive waste. New York, 112 S. Ct. at 2429 (emphasis in original). The law passed controversial policy choices onto the states and thus violated fundamental principles of political accountability. In contrast, the Brady Act does not require the states to legislate or otherwise devise solutions to a national problem. Thus, despite plaintiff's arguments to the contrary (Pl. Br. 8), the Brady Act does not interfere with state sovereignty under the holding of New York. Frank, 78 F.3d at 827; Mack, 66 F.3d at 1031.

Thus, even without reference to the burden imposed by the Act, the nature of its commands plainly distinguishes the Brady Act from the statute struck down in New York. Plaintiff identifies no statute held unconstitutional under the Tenth Amendment on the grounds of practical burden.[15] However, an

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[15] Although the Supreme Court in Usery struck down application of the Fair Labor Standard Act's minimum wage and overtime provisions to the states on the ground that such (continued...)

analysis of the duties required by the Act in any event confirms the statute's constitutionality.

As an eminently reasonable federal response to a pressing national problem, the Brady Act places only temporary and minimal duties on CLEOs and grants them great discretion in determining how to meet their responsibilities. Indeed, it even allows states to avoid its dictates entirely if they have an alternative scheme in place. Moreover, the Act requires the assistance of CLEOs in implementing federal gun control policy only because of the considered congressional judgment that, in the short run, local chief law enforcement officers are uniquely positioned to prevent the illegal transfer of handguns. Finally, Congress has provided enormous financial assistance to states in connection with criminal history records.

In these circumstances, to hold the Brady Act unconstitutional would be tantamount to resurrecting the "rigid" "19th-century" view of federal-state relations, expressly repudiated by the Supreme Court, that "Congress 'has no power to impose on a State officer, as such, any duty whatever.'" FERC, 456 U.S. at 761 (internal citation omitted).

a. The CLEOs' primary responsibility under the Brady Act is to make a "reasonable effort" to ascertain, by consulting "available" records, whether a legal impediment exists to a

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[15](...continued) provisions impermissibly interfered with traditional state functions, this mode of analysis was expressly overruled in Garcia. 469 U.S. at 531.

proposed handgun sale. 18 U.S.C. § 922(s)(2). As an initial matter, this requirement is neither permanent nor universal. The Brady Act provides that, by late 1998, the federal government must establish a national instant background check system. 18 U.S.C. § 922 Note. Firearms dealers will then be required to refer transactions to that system to determine whether any legal impediment exists to the sale. 18 U.S.C. § 922(t)(1). Moreover, even in the interim, the "reasonable effort" requirement does not apply in the 26 states and two territories that have adopted their own licensing or background check schemes. 18 U.S.C. § 922(s)(1)(C)-(D).

Congress had strong reasons to require CLEOs to do the background checks under the interim scheme. Congress made an explicit, considered judgment that CLEOs' access to relevant records and their personal knowledge of their communities would make them "best able to determine if the individual is disqualified to own a gun." H.R. Rep. No. 691, 101st Cong., 2d Sess. 11 (1990); see <u>id.</u> at 10 (knowledge of CLEOs is a "central" benefit of the statute); accord Statement of Rep. Schumer, <u>Brady Handgun Violence Prevention Act: Hearings on H.R. 1025 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary</u>, 103d Cong., 1st Sess. 90 (Sept. 30, 1993) (hereinafter "<u>Hearings on H.R. 1025</u>"); Statement of Rep. Sangmeister, <u>Brady Handgun Violence Prevention Act: Hearings On H.R. 7 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary</u>, 102d Cong., 1st Sess. 15 (Mar. 21, 1991); <u>Hearings on</u>

H.R. 1025 at 89 (test. of Asst. Attorney General Acheson) ("[l]ocal law enforcement has the advantage, which the FBI does not, of in many instances having physical records").

Congress's decision to involve CLEOs in background checks reflected the recommendation of the law enforcement community itself. As the Superintendent of the New Jersey State Police testified to Congress, a CLEO can best perform a background check because he "knows the people in his community. He knows where the complaints come from." Hearings on H.R. 975 and H.R. 155 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 100th Cong., 1st and 2d Sess. 243 (Feb. 24, 1988).

Congress's decision to call on CLEOs for interim assistance also accords with our country's longstanding tradition -- grounded largely in principles of federalism -- against a national police force. See, e.g., Garcia v. United States, 469 U.S. 70, 89 (1984) (Stevens, J., dissenting). Unless Congress relied on CLEOs for interim assistance (or decided to take no action to address the pressing problem it had identified), background checks would have to be performed by federal law enforcement officers. In contrast to the scheme that Congress selected, such a system -- directly contrary to the principles of federalism that plaintiff purports to advance -- would have diminished the states' and localities' historic role in law enforcement and brought us closer to a nationalized police force.

At the same time, while Congress had good reason to require the CLEOs' aid in the interim scheme, it was careful not to place heavy burdens on them. As noted, Congress carefully limited the burden on CLEOs to a "reasonable effort" to determine the legality of a proposed handgun transfer. 18 U.S.C. § 922(s)(2). As several courts have emphasized, the Brady Act's requirements on CLEOs "represent a minimal interference with state functions (Mack, 66 F.3d at 1031) and "require only a minimal effort." Frank, 78 F.3d at 831; see also H.R. Rep. No. 344 at 23 (reprinting Congressional Budget Office statement) (Brady Act's financial "impact on any given jurisdiction is likely to be small"). But see Koog, 79 F.3d at 461 (suggesting that any diversion of local sheriff's resources is not minimal).

Plaintiff's contention that the Brady Act places a "substantial burden" on him (Pl. Br. 10) rests on an unfounded interpretation of the statute that would read the term "reasonable" out of the "reasonable effort" requirement. To be sure, the Brady Act's interim scheme imposes a mandatory duty on CLEOs. See 18 U.S.C. § 922(s)(2) (CLEOs "shall make a reasonable effort"). But Congress did not require CLEOs to insure the legality of the handgun transfer. Rather, it asked them to do only what is "reasonable" in their own circumstances. Put differently, the Brady Act, by its terms, does not place an "[un]reasonable" burden on any CLEO.

This point has been expressly recognized by ATF, which, as noted above, is entitled to substantial deference when it interprets the Gun Control Act, including the Brady Act. National Rifle Assoc. v. Brady, 914 F.2d 475, 479 (4th Cir.

1990), cert. denied, 499 U.S. 959 (1991); Gun South, Inc. v. Brady, 877 F.2d 858, 864 (11th Cir. 1989). ATF has explained that the CLEOs themselves are "in the best position" to determine what measures are "reasonable" in any given instance. ATF Letter, R. 10, Exh. 1 at 10; Supp. App. --. ATF has further noted that "[e]ach * * * CLEO will have to set its own standards based on its own circumstances, i.e., the availability of resources, access to records, and taking into account the law enforcement priorities of the jurisdiction." Id.

Thus, as ATF has made clear, the statute requires no more than "some minimal effort to check commonly available records" and does not necessitate research into "every conceivable record system that may contain information relating to categories of prohibited persons." Id. at 9; Supp. App. --. In addition, ATF has stated that, because the "vast majority of persons who are prohibited from possessing a handgun are prohibited by virtue of some criminal background," a CLEO's reasonable effort may generally focus on readily available criminal history records. Id.; see also 18 U.S.C. § 922 Note (permanent Brady system to be based on criminal history records).[16] Moreover, ATF has concluded that in some circumstances a CLEO may properly determine that it is reasonable not to engage in any research at all, as when purchasers are known personally to local officials.

[16] As ATF noted, these records may indicate not only whether the individual has a criminal record, but also whether the purchaser is disqualified because of drug use or mental health problems. ATF Letter, R. 10, Exh. 1 at 9; Supp. App. --.

See ATF Letter, R. 10, Exh. 1 at 10; Supp. App. --. More generally, in some emergency situations, the "availability of resources * * * [and] law enforcement priorities of the jurisdiction" (see id.), may make diversion of any resources "[un]reasonable."

ATF's interpretation of the Brady Act reflects congressional intent. As noted, the statute contemplates that it generally will be "reasonable" for a CLEO simply to consult "available" records that are accessible directly from the CLEO's office. 18 U.S.C. § 922(s)(2). This statutory language was adopted precisely to avoid onerous burdens on CLEOs. E.g., 139 Cong. Rec. S2001 (daily ed. Feb. 24, 1993) (statement of Sen. Kohl) (CLEOs would "use available resources"); 139 Cong. Rec. H9118 (daily ed. Nov. 10, 1993) (statement of Rep. Nadler) (checks would occur "within the constraints of existing information systems"). See also Frank, 78 F.3d at 831 ("Congress has tailored the Brady Act to require only a minimal effort").

In accord with this congressional intent, the law enforcement community itself has recognized that the statutory duties are minimal. As one law enforcement leader testified to Congress, the Act gives "[t]he law enforcement executive * * * discretion to choose what procedure best suits his or her agency." Hearings on H.R. 1025 at 254 (test. of exec. director of Police Executive Research Forum). Moreover, prior to passage of the Brady Act, local law enforcement officials were already performing background record checks for a variety of purposes.

As one local official testified to Congress, prior to the Brady Act, he would "run probably two or three checks a day in some cases on people who have been stopped for various things." Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary on H.R. 975 and H.R. 155, 100th Cong., 1st and 2nd Sess. 124 (Nov. 30, 1987) (test. of Vice Pres. of Ohio Union of Patrolmen's Assocs.).

Indeed, plaintiff's implementation of the Brady Act underscores the nonintrusive nature of the burden imposed by the statute. Sheriff Lee testified that background checks are completed by his staff of dispatchers who use, among other sources, the NCIC data base. Tr. 46, 54. While waiting for the computer systems to respond, the dispatchers can perform their non-Brady related duties. See Tr. 54. In addition, Sheriff Lee noted that his office also performs computer background checks in conducting criminal investigations. Tr. 55. Because CLEOs can and often do rely on computer checks to meet Brady Act requirements, the Act's burden is plainly not onerous.[17] See Mack, 66 F.3d at 1032; Frank, 78 F.3d at 830.

b. The two additional burdens incident to the "reasonable effort" requirement are even less onerous. The requirement that a CLEO destroy the records pertaining to the background check (18

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[17] Even where state officials choose to rely solely on quick computer checks, their expertise is valuable. They are uniquely able to interpret the results of such checks, by, for example, using their knowledge that a conviction appearing on the data base has been reversed. Indeed, because of their knowledge, state and local officials may be able to decide a person's eligibility without a check.

U.S.C. § 922(s)(6)(B)(i)) is clearly de minimis and without constitutional significance. See Mack, 66 F.3d at 1032 ("minimal requirement of destruction of records presents no constitutional problem"); Frank, 78 F.3d at 831 (same). The fact that Sheriff Lee testified below that he burns such records at his home because his office paper shredder is broken (see Tr. 56) does not change this analysis. Indeed, this requirement does not prevent Sheriff Lee from performing any of his duties.

Similarly, the requirement that a CLEO, on request, state the reason that he has previously found a legal impediment to a proposed handgun transfer (18 U.S.C. § 922(s)(6)(C)) is not burdensome. This provision requires only that the CLEO note the legal bar to the sale by stating, for example, that records indicate that a prospective purchaser is a convicted felon. In sum, as the district court noted, Sheriff Lee "did not allege or testify as to any aspect of his job which remains undone or is unduly delayed as a result of his efforts related to the Act." Op. 15.

c. Finally, in enacting the Brady Act, "Congress has not simply placed a financial burden on the shoulders of States and localities * * * but has provided substantial countervailing financial assistance as well." Garcia, 469 U.S. at 555; accord FERC, 456 U.S. at 770 n.33. Congress has made a "huge" fiscal commitment to assisting the states with implementation of the Brady Act. Hearings on H.R. 1025 at 104 (test. of Asst. Attorney General Acheson). Specifically, the Brady Act authorizes $200 million in funds for grants to states for the "creation of a computerized criminal history record system or improvement of an existing system," improvement of their "access[] to the national instant criminal background system," and, once the national system is in place, "assist[ing] the State[s] in the transmittal of criminal records" to it. 18 U.S.C. § 922 Note. Congress already has appropriated $100 million of these funds for disbursement to the states. Pub. L. No. 103-317, 108 Stat. 1724, 1777 (1994). The interim statutory requirements are thus emphatically "not an unfunded mandate." 139 Cong. Rec. S16304 (daily ed. Nov. 19, 1993) (statement of Sen. Mitchell).

Moreover, this funding augments the significant pre-existing federal commitment in the area of criminal history records. Under the formula grant program established by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, the United States provided nearly $850 million to states in fiscal 1992 and 1993. R. 10, Exh. 4 at 3, Supp. App. --. Five percent of that money -- over $40 million -- must be used for improving state criminal history records. Id. at 5. New Mexico alone has received over $6.5 million under this one program in just those two fiscal years. Id. at 3; Supp. App. --.

* * * * *

In short, the Brady Act is a reasonable congressional response to a national problem. Congress is accountable for its highly publicized legislative action and has appropriated significant funding for its implementation. Under Supreme Court precedent and two centuries of constitutional tradition, the minimal requirements placed on CLEOs to assist the federal government in implementing this federal response to the epidemic of handgun violence do not violate the Tenth Amendment.

II. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFF'S CHALLENGE TO THE CRIMINAL PENALTIES PROVISION OF THE BRADY ACT AS NONJUSTICIABLE.

A. Standard Of Review And Reviewability.

This Court reviews constitutional questions de novo. See United States v. Bolton, 68 F.3d 396, 398 (10th Cir. 1995). This issue was raised below in Plaintiff's Complaint (App. 1 at ¶ IV) and the Memorandum In Support Of Defendants' Motion For Partial Dismissal And For Summary Judgment (R. 10 at 11-13).

B. Plaintiff's Fifth Amendment Claim Is Nonjusticiable.

Plaintiff argues that the Brady Act's criminal penalties provision is unconstitutionally vague under the Fifth Amendment. See Pl. Br. 12-15. The district court -- in accord with both courts of appeals that have addressed this question -- dismissed plaintiff's vagueness claim because it did not present a justiciable case or controversy. This decision accords with well-established precedent and should be affirmed.

The criminal penalties section of the Brady Act, 18 U.S.C. § 924(a)(5), provides: "Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined not more than $1,000, imprisoned for not more than 1 year, or both." Subsections (s) and (t) of section 922 are the principal Brady Act provisions regulating the sale of handguns by firearms dealers.

Plaintiff contends that if he failed to comply with the "reasonable effort" provision of § 922(s)(2), he would be subject to the criminal penalties provision. Pl. Br. 12-13. He then argues that the provision is unconstitutionally vague because "a person of reasonable intelligence has no way of knowing what may constitute a 'reasonable effort.'" Pl. Br. 13.

As the district court properly concluded, plaintiff's claim is not justiciable because he faces no realistic threat of criminal prosecution under the Brady Act. To maintain an anticipatory challenge to the constitutionality of a statute, a plaintiff must show that there is a "credible threat" that he or she will be prosecuted thereunder. Renne v. Geary, 501 U.S. 312, 322 (1991); Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979); Ellis v. Dyson, 421 U.S. 426, 434 (1975); Poe v. Ullman, 367 U.S. 497, 501-09 (1961) (plurality opinion); see also Cole v. Richardson, 405 U.S. 676, 685 (1972) (noting need for a threat of prosecution in context of vagueness challenge); Younger v. Harris, 401 U.S. 37, 42 (1971) ("persons having no fears of state prosecution except those that are imaginary or speculative * * * are not to be accepted as appropriate plaintiffs"); Sierra Club v. Yeutter, 911 F.2d 1405, 1419 (10th Cir. 1990) (plaintiff's claim unripe; "speculative and contingent nature of the harm support our conclusion that judicial intervention is inappropriate").

There is no credible threat of prosecution here. The Department of Justice, through its Office of Legal Counsel, has formally determined that the Brady Act's criminal penalties provision does not apply to CLEOs. R. 10, Exh. 2; Supp. App. --. As the Department interprets the provision, it imposes penalties on the handgun purchasers and dealers whom it regulates, not law enforcement personnel who assist in its implementation. Because the Department has sole authority over federal criminal enforcement, plaintiff is not presently under any danger of prosecution. As Poe makes clear, "[i]f the prosecutor expressly agrees not to prosecute, a suit against him for declaratory and injunctive relief is not such an adversary case as will be reviewed here." 367 U.S. at 507; see American Library Ass'n v. Barr, 956 F.2d 1178, 1196 (D.C. Cir. 1992); Doe v. Duling, 782 F.2d 1202, 1206 (4th Cir. 1986). Thus, as the district court and the Second and Ninth Circuits have concluded, this type of claim is not justiciable. Op. 7-8; Frank, 78 F.3d at 832 (plaintiff "cannot be said to have a realistic fear of prosecution") (internal quotations omitted); Mack, 66 F.3d at 1033-34 (same).

In any case, the district court properly interpreted the statutory language when it concluded that the criminal penalties provision was inapplicable to plaintiff. See Op. 8. As the Supreme Court established in Gregory v. Ashcroft, statutes should not be construed to impose burdens on the states -- much less criminal penalties on state officials -- unless Congress's intent to do so is "unmistakably clear." 501 U.S. at 460 (internal quotation omitted). More generally, courts must interpret statutes to avoid raising significant constitutional concerns.

E.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). And the rule of lenity likewise requires that all criminal statutes be narrowly construed in cases of ambiguity. E.g., Busic v. United States, 446 U.S. 398, 406 (1980).

As several district courts have recognized, the Brady Act does not provide that CLEOs are subject to criminal penalties. See Op. 8; Koog, 852 F. Supp. at 1388, rev'd on other grounds, 79 F.3d 452 (5th Cir. 1996); McGee, 863 F. Supp at 324 n.3, rev'd on other grounds, 79 F.3d 452 (5th Cir. 1996); Printz, 854 F. Supp. at 1510, rev'd on other grounds, 66 F.3d 1025 (9th Cir. 1995). Subsections (s) and (t), the interim and permanent provisions of the Brady Act, respond to the dangers created by illegal handgun transactions and regulate firearms transactions between licensed dealers and other private parties. Chief law enforcement officers assist in the implementation of subsection (s); they are not themselves the subject of the regulatory scheme, and they form no part of the danger addressed by the Act. A CLEO's failure to implement the Act's regulatory restrictions is not a "violat[ion]" of the regulatory scheme that would trigger the criminal penalties provision.

The legislative history of the statute also shows that there was no congressional intent to subject CLEOs to criminal penalties. The criminal penalties provision was part of the Brady Bill before Congress added the requirement that chief law enforcement officers make a "reasonable effort" to ascertain whether the handgun transfer would violate the law. See H.R. 7, 102d Cong., 1st Sess. 5, 8 (1991). There is no indication that Congress intended to alter the scope of the criminal sanctions provision when it included the "reasonable effort" requirement of § 922(s)(2). Indeed, it would have been incongruous for Congress expressly to exempt CLEOs from all civil liability (see 18 U.S.C. § 922(s)(7)) and simultaneously subject them to criminal sanctions.[18]

Congress's decision to adopt a flexible "reasonable effort" requirement further supports the narrow reading of the statute. Congress vested broad discretion in CLEOs and was not concerned with problems of "vagueness" because it had no intention of subjecting them to penalties or damages of any kind, criminal or civil.

III. EVEN ASSUMING THAT THIS COURT ACCEPTS ANY PART OF PLAINTIFF'S ARGUMENT, THE CHALLENGED PROVISIONS ARE SEVERABLE.

A. Standard Of Review And Reviewability.

Whether the challenged provisions of the Brady Act are severable, is a legal issue that this Court reviews de novo. See Swafford v. United States, 998 F.2d 837, 839 (10th Cir. 1993). This issue was raised below in Defendants' Memorandum In Support Of Motion For Partial Dismissal And For Summary Judgment, R. 10

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[18] Given that the legislation did not provide for criminal penalties against CLEOs, it was perfectly rational and consistent for Congress specifically to exempt CLEOs from civil liabilities, such as liability under state tort law, that would arise from sources outside the Brady Act itself.

at 32-33 and in Plaintiff's Memorandum In Opposition To Motion For Partial Dismissal And For Summary Judgment, R. 15 at 15-18.

Plaintiff's opening brief on appeal does not raise the severability issue; however, out of an abundance of caution we have briefed the issue.

B. Even If This Court Accepts Any Of Plaintiff's Argument, The Challenged Provisions Are Severable.

Because the district court upheld the Brady Act in its entirety, it did not need to reach the question of whether the provisions challenged by plaintiff are severable from the remainder of the Act. Assuming that this Court affirms the judgment below, the issue need not be reached on appeal. However, even if this Court were to reverse the district court and hold the challenged provisions unconstitutional, such provisions are severable from the remainder of the Act.

Every court that has addressed this issue has properly held that the challenged provisions were severable. Koog, 79 F.3d at 462-63; McGee v. United States, 863 F. Supp. at 327, aff'd, 79 F.3d 452 (5th Cir. 1996); Frank v. United States, 860 F. Supp. at 1044, rev'd on other grounds, 78 F.3d 815 (2d Cir. 1996); Mack v. United States, 856 F. Supp. 1372, 1382-83 (D. Ariz. 1994), rev'd on other grounds, 66 F.3d 1025 (9th Cir. 1995); Printz v. United States, 854 F. Supp. 1503, 1518-19 (D. Mont. 1994), rev'd on other grounds, 66 F.3d 1025 (9th Cir. 1995); Romero v. United States, No. 94-0419 (W.D. La. Dec. 8, 1994).

1. These unanimous rulings reflect the fact that the Supreme Court has established clear -- and very high -- standards for striking down an entire statutory scheme on the basis of individual provisions that have been held unconstitutional. As long as what remains is "'fully operative as a law,'" an invalid provision must be severed "'[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power.'" New York, 112 S. Ct. at 2434 (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987)) (emphasis added); United States v. Jackson, 390 U.S. 570, 585 (1968) (stating the same test); Koog, 79 F.3d at 462.

Moreover, the Gun Control Act, which the Brady Act amends,[19] contains an express severability clause, 18 U.S.C. § 928, which unambiguously expresses Congress's intent that the balance of the "chapter" -- which, of course, includes the Brady Act -- would remain operative even if a specific "provision," such as § 922(s)(2), is held invalid. The presence of this explicit instruction in the statutory text makes the already stringent test even more demanding here. Alaska Airlines, 480 U.S. at 686; INS v. Chadha, 462 U.S. 919, 932 (1983).

2. Here, this heavy burden to demonstrate nonseverability is not met. To begin with, even without the "reasonable effort" requirement of § 922(s)(2), the remainder of the interim scheme would be "fully operative as a law." New York, 112 S. Ct. at 2434. Gun dealers would still be required to inform CLEOs of

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19 Indeed, the Brady Act is a quintessential statutory amendment because it "simply provides a means for implementing the Gun Control Act's [preexisting] prohibition against sales to certain classes of buyers." Mack, 856 F. Supp. at 1383; see also Koog, 79 F.3d at 463 n.12; Printz, 854 F. Supp. at 1519.

potential gun transfers (18 U.S.C. § 922(s)(1)(A)(i)(III)-(IV)), and CLEOs who so desired could still conduct background checks on an optional basis. If a CLEO chose not to do the checks, the dealer would be allowed to transfer the weapon after five business days had passed. Id. § 922(s)(1)(a)(ii)(I).

Moreover, a severed statute would substantially advance Congress's key purpose: taking immediate action to address the national epidemic of handgun violence. E.g., H.R. Rep. No. 344, 103d Cong., 1st Sess. 7-8 (1993). Most important, this scheme would provide the overwhelming majority of CLEOs who support the Act with the opportunity -- i.e., the time and information necessary -- to stop illegal handgun sales. See H.R. Rep. No. 344 at 13, 14 (noting Brady Act was supported by the Fraternal Order of Police, the International Association of Chiefs of Police, the National Sheriffs Association and other law enforcement groups). As the International Association of Chiefs of Police told Congress, "compelled or not, we in law enforcement management want to conduct the background checks." Brady Handgun Violence Prevention Act: Hearings on H.R. 1025 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary, 103d Cong., 1st Sess. 207 (1993).

Thus, the situation here is analogous to that in New York itself. There, the Court found the statute severable because that action would not "defeat[]" the "purpose of the Act" even though states would be less likely to comply with Congress's objectives absent the take title requirement. See 112 S. Ct. at 2434.

A severed statute would also further Congress's intent by providing a cooling-off period to reduce crimes of passion. Brady Act supporters saw the cooling-off period as a key benefit of the legislation. The legislative history is replete with references to the importance of such periods.[20] Congress further expressed its support for cooling-off periods by defeating amendments intended to preempt state waiting periods enacted for this purpose. See 139 Cong. Rec. S16321 (daily ed. Nov. 19, 1993); id. H9141 (daily ed. Nov. 10, 1993).

In sum, the severed statute would be fully operative and would serve Congress's paramount purpose in passing the interim provisions of the Act: to help put an immediate stop to the epidemic of gun violence. Thus, it is far from "evident" that Congress, deeply concerned with the problem of gun violence,

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[20] E.g., 139 Cong. Rec. S16323 (daily ed. Nov. 19, 1993) (Sen. Kohl) (quoting 1976 National Rifle Association statement that "waiting period could help in reducing crimes of passion"); id. S16319 (Sen. Murray) (Brady Act "requires a cooling-off period so that someone in a rage cannot get immediate gratification by buying a gun"; "[w]hat we really need is a nationwide ceasefire, but at least the Brady bill will give us a national cooling-off period"); id. S16324 (Sen. Lautenberg) ("Too many crimes are committed by people in the thro[e]s of passion. A cooling off period is critically important."); id. H9089 (daily ed. Nov. 10, 1993) (Rep. Derrick) ("the waiting period will save lives by providing a cooling off period that will prevent handgun purchases in the heat of passion"); id. H9106 (Rep. Roukema) ("[e]ven more crucial, only this Brady bill allows the waiting period necessary to stop a flash of temper or moment of heated passion"; "[t]his cooling off period is absolutely critical"); id. H9110 (Rep. Schenk) ("The waiting period is not just a time to run a background check. It is also a cooling off period that can prevent individuals from taking impulsive actions with deadly consequences.").

would have taken no action at all rather than accept the many benefits of a severed statute. See Koog, 79 F.3d at 463 ("we cannot conclude, in the light of the strong presumption of severability created by Section 928, that Congress would have failed to enact" remainder of statute); Mack, 856 F. Supp. at 1383 (statute could be severed without "doing damage" to Act Congress passed); see generally Printz, 854 F. Supp. at 1519 (the fact "[t]hat Congress chose a mandatory provision instead of one that was optional does not mean that Congress preferred no Act to one that contained only the optional provision"). Accordingly, if this Court finds any of the Act's requirements invalid, those provisions should -- as every court to consider the issue has concluded -- be severed from the remainder of the Act.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the district court.

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Rethinking justice in America

Fifty years ago Allied soldiers landed on the beaches of Normandy. With the Nazis gone, the French, in celebration of their newly recovered freedom, returned to a system of justice befitting a free, democratic people.

With Liberty, Equality and Fraternity re-established in the land, the accused in criminal cases would henceforth be tried by three judges and seven jurors. When all evidence was heard and the jurors withdrew, the judges would also withdraw, making 10 people in the jury room. To convict required six votes: three judges and of the seven jurors only three. Let freedom ring!

France has since loosened this system a bit, but not that much. And the French system is fairly typical of judicial procedures of most of the great civilized nations of the Continent — whose welfare programs President Clinton so admires but of whose judicial systems he seems to know absolutely nothing. England, of course, has its own legal system, but even this has changed substantially since Mr. Clinton was a Rhodes Scholar.

Richard Grenier

In these areas lawyers are often the most ignorant. The strongest link still binding the United States to England is our common judicial system. Britain and America have admittedly evolved differently, yet the almost universal assumption among members of our legal culture is that in matters of law the two countries have remained identical. They are wrong.

American lawyers are almost invariably stunned when I tell them that for more than two decades now Britain — with a crime rate a fraction of ours — has given up the unanimity rule for jury trials. In England (Scotland has 15 jurors), they now convict on 10 votes out of 12. And in England, as in virtually every other democratic country, when police gather evidence against a suspect improperly, authorities punish the police. In America — a beacon of hope unto all criminal-kind — we exclude such "tainted" evidence from the trial. And even when there isn't the faintest doubt of the guilt of the accused, we let him go free.

Now the Sixth Amendment to our Constitution guarantees the accused the right to a speedy and public trial by an "impartial" jury. But it prescribes neither the size of the jury, nor how large a majority is required to convict, nor the faintest suggestion as to what sorts of juror will be impartial. Our present stupendous crime rates — the highest of any civilized nation in history — might suggest that if the Constitution is to be modified on criminality, it might be tightened up a bit.

Whereas almost all changes in interpretation in recent decades have been making it steadily more lax. And this with crime now become America's national obsession and the world's other democratic nations observing our judicial behavior in stunned disbelief. In a recent, superb public speech Justice Clarence Thomas evoked the havoc wreaked in our society by what he called the unbridled "rights revolution." And this is where Justice Thomas' "rights revolution" has led us.

Now I firmly subscribe to Charles Murray's view that a prime mover in our skyrocketing crime rate is our rate — also skyrocketing — of illegitimate births. However well-intended were the social programs that brought about this subsidizing of illegitimacy, they're producing today huge numbers of "unsocialized" young males, who are doing most of the mischief. Yet I'm not prepared to wait 25 or 50 years for a declining illegitimate birth rate to solve our crime problem for us. I want to know what we can do now.

I plead guilty here to an education conducted eccentrically not only in America but in Europe, principally England and France. And I can't help but notice that Mr. Clinton is enthralled by his vision of the European welfare state —some 20 years behind the times, as it's now in the most dire circumstances. But since all opinion polls show the American people now consider crime our No. 1 national problem (not health care or the economy, stupid), I wish Mr. Clinton would cast his eye on the way European countries he so admires deal with crime. He recently made a step in the European direction by announcing he favored "frisking" suspects for weapons, a move I wholeheartedly support and hold not to be in violation of the Third Amendment's prohibition against "unreasonable" searches. I've been writing this for years. I don't have space here to give the president a full course in European police and judicial procedures, although an article in a recent issue of the National Review by Ernest van den Haag ("How To Cut Crime") could serve as an astringent primer.

Congress' crime bill, although it stumbles in the right direction now and then, will, I sadly predict, have virtually no effect. Money to increase the potential criminal's "self-esteem" by providing him with arts and crafts training and dance programs — dear to the heart of Janet Reno — are embarrassing. As are hollow threats of draconian punishment.

If the social worker we have as attorney general had the faintest notion of how to reduce crime, she'd attack its real "root cause" —which is not poverty or ignorance but simply its low cost to the potential criminal. Over something like a decade, the likelihood of serious crime leading to imprisonment in this country fell by 80 percent. And the Iron Law of Crime is that when the risk of punishment falls, the crime rate rises.

A whole pious literature has arisen according to which punishment doesn't "deter," as criminals don't do a careful cost/benefits analysis of their planned crime. But neither do rats in laboratory experiments do a cost benefits analysis of which path leads to the electric shock and which path leads to the cheese. But somehow they learn to take the path to the cheese.

Richard Grenier is a columnist for The Washington Times. His column appears here Monday and Wednesday.

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David S. Broder

Brady Bill Boomerang

Congress amends or repeals scores of laws each year, but there is one law that never goes away: the law of unintended consequences. The latest boomerang involves the Brady bill, the controversial measure to impose a five-day waiting period for purchases of handguns.

It was signed with great publicity last December as a breakthrough victory for gun-control advocates and a tribute to the tenacity of Sarah and Jim Brady—he the popular press secretary who was badly wounded in the 1981 assassination attempt against President Reagan.

Far less attention has been given to the May 16 federal court decision that the key section of the Brady bill—requiring a check of criminal records, drug or mental problems of gun applicants—is a violation of the Constitution and unenforceable anywhere in the country.

The law was not thrown out because it violated the Second Amendment—the right to bear arms. That issue, the battle cry of the National Rifle Association, was not even raised in this lawsuit. Rather, it was found to violate one of the most neglected provisions of the Constitution, the 10th Amendment, reserving to the states and the people all powers not assigned to the federal government.

Specifically, District Judge Charles C. Lovell of Missoula, Mont., said that the feds had overreached themselves when they told Ravalli County Sheriff Jay Printz he had to divert deputies from their other duties to do background checks on Montana gun buyers.

The last thing Congress had in mind when it passed the Brady bill was providing another opening for Washington's critics to raise the issue of unfunded federal mandates on the states and localities. Organizations representing cities and states have been on the warpath all year against the feds' habit of dreaming up new assignments they want the lower levels of government to pay for and carry out. Those unfunded mandates cost billions.

The mandates issue and the 10th Amendment were raised in congressional debate but brushed aside in the rush to enact the waiting-period law. The court, however, in a decision that is certain to be appealed, said these questions could not be so easily discarded.

Prior Supreme Court rulings on 10th Amendment cases are anything but simple to reconcile or understand. But Judge Lovell found his footing in a 1992 case in which New York successfully challenged a federal law requiring states to dispose of radioactive wastes according to Congress's directive.

Lovell said his reading of the 6-3 decision in *New York v. United States* led him to conclude that the background check part of the Brady bill is unconstitutional "because it substantially commandeers state executive officers and indirectly commandeers the legislative processes of the state to administer a federal program."

The five-day waiting period remains in effect, under the decision, but without background checks, it obviously doesn't accomplish much. That's a setback to the hopes of gun-control advocates, of whom I am one. But the principle raised by Judge Lovell is a vital one.

Sheriff Printz told the court that he has 16 officers and 13 support people at his disposal to provide law and order for 30,000 residents scattered through 2,400 square miles of rugged country near the Idaho border. Chasing down records, some kept hundreds of miles away, would divert them from their other duties, he said. He convinced Judge Lovell that as a local elected official, he was being asked by Washington not only to "bear the brunt of its [the law's] unpopularity" among his gun-owner constituents but to cut back other activities of his department or seek a higher budget.

As the judge dryly observed, "The corollary to state and local governments being held financially accountable for the act is that the federal government will not be. . . . The federal officials will receive some of the accolades or criticism for their program, but they will not suffer any of the consequences for the cost."

The Justice Department argued, unavailingly, that the imposition on Sheriff Printz and his crew was minimal and should not raise any constitutional objections in the judge's mind. It even argued that in the circumstances facing Sheriff Printz, "a 'reasonable' effort [to do background checks] may be no effort at all." But the judge wasn't buying that sophistry.

The underlying issue is very important. Washington spends all its money and borrows, each year, hundreds of billions more. Still, that does not satisfy its appetite for action, so it increasingly has fallen into the habit of mandating other people to carry out and pay for its wishes.

Sometimes, as with the Brady bill, the costs fall mostly on other governments; sometimes, as with the Americans With Disabilities Act, on both private business and the public sector. The causes are generally good ones, but as this decision reminds us, there is a reason why the Constitution tried to limit the reach of federal officials.

It's a matter of accountability. Washington, like everyone else, has to learn to pay for its good deeds.

INTERNATIONAL UNION OF POLICE ASSOCIATIONS AFL-CIO

THE ONLY UNION FOR LAW ENFORCEMENT OFFICERS

SAM A. CABRAL
International President

ARTHUR J. REDDY
International Secretary-Treasurer
Legislative Liaison

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Faced with recent campaign promises by Senator Dole claiming to support anti-crime measures, the International Union of Police Unions remains firm in its support of President Clinton's proven effective measures. Art Reddy, the I.U.P.A.'s Secretary - Treasurer and Legislative Liaison said, " The latest proposal by Dole to create an "instant check" system for prospective gun buyers falls far short of the mark and would do damage to programs created under the Administration's Brady Bill. While an instant check system is desirable, it cannot become a reality for most of the nation's police departments for years to come". Reddy is a retired Sergeant and thirty three year veteran of the Los Angeles Sheriff's Department.

Chris Strobe, a Virginia police officer and representative of VCOPS, the Virginia Coalition of Police and Sheriffs representing law enforcement personnel throughout Virginia reinforced the I.U.P.A. position. "The Brady Bill must be preserved in order to bring an orderly process to gun purchases while screening out criminals. Considering the fact that more than 60,000 people and more than 43,000 criminals have been denied access to lethal weapons since the establishment of the Brady Bill, law enforcement agencies need the next several years to utilize the $200 million made available by the Clinton Administration to improve the speed and effectiveness of the screening process.

According to Reddy at the I.U.P.A. and Strope of VCOPS, the Clinton Administration has been the most responsive administration in support of rank and file law enforcement personnel and issues in recent history. "The diverse elements of the 1994 Crime Bill with its potential for 100,000 new officers, the ban on assault weapons whose only purpose is to kill human beings, its tough sentences for repeat criminals, and prevention programs to reduce the incentives for criminal activity all constitute the best hope of a more secure future for both the law enforcement community and public safety". The I.U.P.A. is calling on its more than 40,000 active duty law enforcement officers in the United States to continue their support for programs that truly support them.

END

The Law Enforcement Steering Committee

November 15, 1993

The Law Enforcement Steering Committee strongly supports the Brady Bill, S.414. The Law Enforcement Steering Committee consists of ten national organizations representing chiefs, sheriffs, rank-and-file officers and troopers. From federal, state and local law enforcement agencies, our organizations collectively represent more than 500,000 law enforcement officers nationwide. For the past six years, the Steering Committee has lobbied hard and long for the Brady Bill and now see an enacted Brady Bill in sight.

[redacted]

We are aware of an NRA substitute version of the "Brady Bill" which will be offered as an amendment to the crime bill currently being debated by the Senate. We want you to know that your nation's police are unconditionally and unequivocally opposed to incorporating this NRA substitute version of the Brady Bill into the crime bill.

Please stand with law enforcement by voting to table any NRA substitute version of the Brady Bill which is offered as an amendment to the crime bill. Then when the real Brady Bill, S.414, comes to the Senate floor as a separate bill, stand with law enforcement once again and vote to pass the Brady Bill, S.414, without any weakening amendments.

Thank you for your consideration of our concerns.

Dewey R. Stokes
Dewey R. Stokes, President
Fraternal Order of Police

Robert T. Scully
Robert T. Scully, Executive Director
Nat'l Association of Police Organizations

James A. Rhinebarger
James A. Rhinebarger, Chairman
Nat'l Troopers Coalition

Kenneth Lyons
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Steering Committee Members

Federal Law Enforcement Officers Association
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International Brotherhood of Police Officers
Major Cities Chiefs

National Association of Police Organizations
National Organization of Black Law Enforcement Executives

National Sheriffs' Association
National Troopers Coalition
Police Executive Research Forum